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HARVAR

RAY

REPORTS
OF
C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT;
AND IN THE
COURT FOR THE TRIAL OF IMPEACHMENTS
AND THE
CORRECTION OF ERRORS,
OF THE
STATE OF NEW YORK.

BY ESEK COWEN,
COUNSELLOR AT LAW.

VOLUME II.

NEW YORK:
BANKS & BROTHERS, LAW PUBLISHERS,
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1859.

Southern District of New York, ss.

BE IT REMEMBERED, that on the sixth day of October, A. D. 1824, in the forty-ninth year of the Independence of the United States of America
L. S. William Gould and David Banks, of the said district, have deposited in this office the title of a book, the right whereof, they claim as proprietors, in the words following, to wit:

"Reports of Cases argued and determined in the Supreme Court; and in the Court for the Trial of Impeachments and the Correction of Errors, of the State of New York. By Esck Cowen, Counsellor at Law. Vol. II."

In conformity to the Act of Congress of the United States, entitled "An Act for the encouragement of Learning, by securing the copies of Maps, Charts, and Books, to the authors and proprietors of such copies, during the time therein mentioned." And also to an Act, entitled "an Act, supplementary to an act, entitled an Act for the encouragement of Learning, by securing the copies of Maps, Charts, and Books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

JAMES DILL,
Clerk of the Southern District of New York.

Rec. Sec. 12, 1820

JUDGES
OF THE
COURT FOR THE TRIAL OF IMPEACHMENTS
AND THE
CORRECTION OF ERRORS,
DURING THE TIME OF THE FOLLOWING REPORTS.

ERASTUS ROOT, Lieutenant Governor, *President.*
NATHAN SANFORD, *Chancellor.*
JOHN SAVAGE, *Ch. J.* } *Justices of the Supreme*
JACOB SUTHERLAND, } *Court.*
JOHN WOODWORTH,

SENATORS.

FIRST DISTRICT.

WALTER BOWNE,	JOHN A. KING,
JASPER WARD,	JOHN LEFFERTS

SECOND DISTRICT.

JOHN HUNTER,	JOHN SUDAM,
STEPHEN THORN,	JAMES BURT

THIRD DISTRICT.

CHARLES E. DUDLEY,	JAMES MALLORY.
EDWARD P. LIVINGSTON,	

FOURTH DISTRICT.

ARCHIBALD M'INTYRE,	MELANCTON WHEELER
JOHN CRAMER,	DAVID ERWIN.

FIFTH DISTRICT.

THOMAS GREENLY,	SHERMAN WOOSTER
ALVIN BRONSON,	

SIXTH DISTRICT.

FARRAND STRANAHAN,	ISAAC OGDEN,
TILLY LYNDE,	SAMUEL G. HATHAWAY.

SEVENTH DISTRICT.

BYRAM GREEN,	SILAS BOWKER,
JONAS EARL, JUN.	JESSE CLARK.

EIGHTH DISTRICT.

DAVID EASON,	TIMOTHY H. PORTER,
HEMAN J. REDFIELD,	

SAMUEL A. TALCOTT, *Attorney General.*

PREFACE

THE legislature having repealed the remedy by certiorari from a Justice's Court, except as to the city of New York, the following volume will be found to contain but few cases on this subject. Perhaps they should hereafter be dropped entirely in our reports, except where they relate to the city of New York, or to the practice upon the writ of certiorari generally.

In relation to the more important and novel cases, I could have saved myself no little labor, indeed the greatest and most difficult labor of reporting, had I confined myself to the statement of the case, the points raised, and the opinion of the Court, leaving the arguments of counsel entirely out of view; but I found myself admonished, both by precedent and propriety, that such a course would be a neglect of duty; and it follows, that, designedly to give a very partial history of those arguments, would be so only in an inferior degree. They lead the mind to consider and understand the point of decision. They exhibit the doubts in which it was involved, and the difficulties to be removed—test the accuracy and weight of the decision—and not unfrequently are an essential link of connection and application between the case stated and the opinion of the Court. It is not unusual, both in England and in this country, for the Judge to content himself with simply giving the opinion of the Court, referring for the reasons in its support to the argument of counsel by which it was sustained.

Those acquainted with the character of the able counsel who grace the bar of the Court of Errors and Supreme Court, will not

be surprised, if, "beside the *substance*, I have been often struck with the *form* of an argument," and will excuse the attempts I have sometimes made to retain both in the report. Knowing, as I do the great respect which their honors of the Senate, the Chancellor and Judges, entertain towards the bar, and how highly they appreciate the assistance derived from counsel in the decision of causes, I feel that this alone is a sufficient warrant for the attempt to enrich these reports with their researches. Entertaining these views, I have endeavored to preserve, at least, the substance of arguments, though I am sensible how many times this has been but an endeavor. It is not unusual, in the Court of Errors, for the discussions of counsel, in a single cause, to occupy several days. These, in the fullest warrantable report, must be reduced comparatively to a very narrow compass. In doing this, the form of the argument may be entirely lost, and its matter greatly diminished. So of some cases in the Supreme Court. All I dare hope is, that they will be found to have been preserved with a fidelity and success which bears some reasonable proportion to the nature of the undertaking.

I must again remind the profession, that most of these reports are composed from my notes of oral arguments and opinions taken in Court. Almost the only exceptions are, the opinions of the Chancellor, Judges and Senators, in calendar causes, in most of which, though not in all of these, copious notes are obligingly furnished by the Judge who gives the opinion. I mention these facts that any inaccuracy or obscurity of expression which may have intervened, shall be imputed to the proper source. They lie between me and the printer. The amazing extent and weight of judicial business in which their honors are engaged, forbid them, or any other men, under the like circumstances, to do much more than attend to its immediate disposition, without revising opinions in cases which are to be reported.

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THE
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CASES
ARGUED AND DETERMINED
IN THE
COURT FOR THE TRIAL OF IMPEACHMENTS
AND
THE CORRECTION OF ERRORS
OF THE
STATE OF NEW YORK,
IN SEPTEMBER AND DECEMBER, 1823.

MEMORANDUM.—During the last vacation, Chancellor **KENT** having arrived at the age of sixty, **NATHAN SANFORD**, Esq., counsellor at law, was appointed his successor. Chancellor **SANFORD**'s commission bears date the 1st day of August, 1823.

JOSEPH SPENCER, Esq., Senator, died shortly after the close of the April session, 1823.

SAMUEL BEARDSLEY, Esq., Senator, having been appointed District Attorney of the United States, for the Northern District of New York, resigned his seat in the senate, during the last vacation.

WILLIAM SEYMOUR, Appellant,
against
ELIZA ANN ELLISON & others, heirs of **THOMAS ELLISON**
 deceased, Respondents.

SEPT. 11, 1823. This cause being called in its place on the calendar, the Hon. **S. R. Betts**, Judge of the second Circuit, stated to the Court that he had been originally con-

A circuit judge will not be allowed to act as counsel

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cerned for the respondents ; and had argued for them in the Court of Chancery, where he was their only counsel ; that on his appointment as Circuit Judge, Mr. JOHN WELLS*

*SKETCH OF THE LIFE AND CHARACTER OF MR. WELLS.

in the court of errors.

Whether an attorney, counsellor, &c., holds, as such, an office or public trust, within the meaning of the 7th section of the 5th article of the constitution ?
Quere.

It is by no means the least testimony to the high stand which the late John Wells, Esq., occupied at the bar of this state, that his death deranged and shortened, in a very considerable degree, the calendar of the present session. Repeated applications were made and granted for the postponement of arguments to the next term, with a view to the preparation of other counsel. Upon making one of these motions, Mr. B. F. Butler took occasion to bestow a brief and extemporary, but beautiful and appropriate eulogium upon the memory of this distinguished advocate. The bar of Albany, and those attending Court from different parts of the state, assembled at the Court room in the Capitol, (the late Chancellor Kent in the chair,) and, on motion of the late Chief Justice Spencer, resolved to wear the accustomed badge of mourning for thirty days. A similar meeting was holden, and similar resolutions passed by the bar of the city of New York ; and the obituary notices of the day abounded with very just remembrances of Mr. Wells' worth and genius. He was indeed the pride of our bar ; and I need make no apology for occupying this place in presenting his surviving brethren of the profession with such particulars of his life and character as have come to my knowledge.

John Wells was born on the farm now owned by Mrs. E. Davis, about one-half mile south of the present village of Cherry Valley, in the county of Otsego, in this state. The accounts as to the time of his birth, which I have been able to obtain, differ, between 1769 and 1770. The surrounding country was then a wilderness. During the war of the revolution, which shortly followed, the settlement where he was born took its full share in the horrors and cruelties of Indian warfare ; and has recently been distinguished by lying in the neighborhood which Mr. Cooper selected as the scene of his beautiful novel, "The Pioneers." Wells' paternal grand parents were both natives of Ireland and formed a part of a little band of colonists, who, several years before, penetrated the then extensive wilds of that region, and settled in the Valley where the village now stands. His maternal grand-father was the Rev. Mr. Dunlap, who came also from Ireland with the colonists.

His father, Robert Wells, owned a farm in Cherry Valley, on which he resided in 1778, with his wife, by whom he had five children, John being the second. These, together with an unmarried brother, John, and a maiden sister, Jane, composed his family, who, with him, were the only descendants of the paternal grand-father, that bore the name of Wells.

During the summer of that year, the indications of a descent from the savages were so numerous and striking, that the father became seriously apprehensive for the safety of his family ; and he accordingly removed them to Schenectady, as a place of greater security. But, in the autumn,

had been engaged as counsel, the melancholy news of whose death had just been received. In consequence of this event,

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his fears subsiding, they returned, and arrived at the farm on the 11th of November, with the exception of his son John. He had some time before been placed by his father at school in Schenectady; and having become much engaged in his juvenile studies, and being moreover a great favorite of his aunt Eleanor Wilson, with whom he boarded at that place, it was determined that his progress as a learner should not be interrupted, and he was left to continue his attendance at school. It was probably owing to this circumstance, that he survived the conflagration and murders which soon after desolated the neighborhood of his birth.

His father's family, with several of his neighbors, who had been driven abroad at the same time, and for the same cause, had been lulled into a fatal security by those false appearances which their aboriginal enemies knew too well how to practise; and on the 11th November, 1778, almost every family resident at the Valley, had thus been lured to return within reach of the tomahawk. During the same month of November, and but a few days after Wells' family had reached the Valley, the celebrated Brandt, learning that the harvest of his vengeance was full, seized the opportunity to effect a descent which he had for a long time meditated. This chief, with one of the Butlers, at the head of a party of savages and their British allies, advanced upon the Valley in the night; and the connections of young Wells were among the first who fell victims to their fury. All his relations, resident at the farm, were murdered; Mrs. Dunlap, his maternal grand-mother, then living at the Valley, shared the same fate; and her husband, with other members of her family, were taken prisoners. His paternal residence was burned to ashes, and the whole settlement plundered and finally destroyed. Young Wells had a brother Samuel, who was older than himself, by about two years, Robert and William who were younger, and a sister Eleanor, aged about five years. His youngest brother was not more than six months old. Indeed, the massacre of Cherry Valley affords one of the most awful illustrations of the rule which governs Indian warfare: "The indiscriminate destruction of all ages, sexes and conditions."

Cut off at this early age from the tenderest attachments of life, and left (like Logan) without one living mortal who was naturally and immediately interested in his fate, young Wells would have been, either abandoned to poverty and wretchedness, or bent down to the ordinary drudgery of life, had not his warm-hearted and affectionate aunt, Mrs. Wilson, interposed in his behalf, and formed him to a higher destiny. For his future prospects in life, she saw him thrown entirely upon her friendship and resources; and though I cannot learn that the latter were very ample, he found the former not of that sunshine character to be dissipated by the dark cloud which had gathered over his fortunes. Through her exertions, which were, of course, indulged and aided by her very kind and generous husband, he enjoyed the best opportunity for acquiring an education which the country then afforded.

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the respondents were without counsel; and he submitted whether it was proper for him to argue their cause in this Court.

He continued several years at the grammar school in Schenectady, whence his aunt Wilson removed to Long Island, where he studied with the Rev. Mr. Cutting, of Jamiaca. He was afterwards at school in New York and at Newark (New Jersey,) at which last place he finished his studies preparatory to entering college. He pursued his collegiate course at Princeton, where he graduated in 1788, having an oration assigned him as his part in the commencement of that year. He took both the degrees of A. B. and A. M. at this college.

Though of an age, at the time, not fully to realize the appalling story of Brandt's descent, and the fate of his family and neighborhood, yet accompanied as it was by scenes of similar cruelty, occurring throughout the whole period of the revolution, the mental wound which he had received was deepened by the dreadful associations continually brought back to his memory; and the recollection of his early loss finally made a permanent impression upon his mind. His health not being the best, and his struggles to excel as a scholar unremitted and severe, these causes combined, gave him, at one time, an air of melancholy and premature decay. Just before the close of his studies at Princeton, his friends entertaining serious apprehensions that he was in a hopeless decline, he left college, for a short time, pursuant to their advice, with a view to recruit his health. The experiment succeeded in a very considerable degree; and he was enabled shortly after to return, and complete his course of classical studies.

After graduating, he must shortly have entered upon his clerkship; for his license as attorney was signed in 1791. This clerkship, together with the professional studies accompanying it, he pursued principally with Mr. Edward Griswold, then in full practice as attorney and counsel in the city of New York. Mr. Griswold, some time since, retired from business and now resides at Hempstead, in Queens county, (L. I.) He had arisen to very high reputation in his profession. As a proof that he eminently deserved this reputation, it is enough to mention, that after a retirement of several years, he is still sought out and consulted with the greatest advantage and deference, by some of the most eminent counsel in the city of New York; and this too upon the most intricate heads of the common law. Col. Burr lately mentioned to me that Mr. Griswold was the only man he ever saw who loved the black-lettered lore of the common law for its own sake; and Mr. Wells, in the full zenith of his reputation, always spoke of the professional habits and acquirements of his early tutor and friend, in terms of the highest respect. The example alone of such a man must have been of very great advantage to his pupil; and I am told, that in one respect, at least, there was a remarkable similarity between them: This was in a most powerful and singular habit of mental abstraction, which enabled them to sit down in the midst of their families, or a crowd

Root, President. This question will depend on the construction of the seventh section of the fifth article of the

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of company, separate themselves from the sports, or the business, or the noise around them, and insulated and deaf to every thing that was passing, pursue their studies equally unconscious of any thing like interruption, as in the deepest retirement of the closet.

On concluding his clerkship, Mr. Wells was thrown upon his own resources; and these were nothing beyond his profession. He immediately opened an office at a room in Pine street, New York; but though the stores of legal knowledge, which he had laid in during his clerkship, must have been more ample than usual, his industry great, his attendance upon his office constant, and the execution of what business was committed to his hands, faithful; yet, absolutely precluded from the more splendid labors of the forum, by lacking the degree of counsel, wanting in connections, and those friends who could successfully take any immediate interest in his professional success, and located among a large number of attorneys, who had in a measure monopolized the management of those suits which are the most valuable to this class of the profession, it is not singular that during the time which intervened between his first and second law degree, his prospects should have been discouraging. His business was accordingly very limited; affording him but a scanty livelihood. But he was not yet so far disheartened as to relax in his studies; and he came to the bar, after the ordinary term of practice as an attorney, well prepared for the higher duties of the profession. His license as counsel was signed in 1795. He still continued his practice in Pine street, his business receiving some trifling accessions, but not to an extent which would be, in the last, flattering to the most sanguine temper; and, for several years afterwards, he pursued the humble avocation of a mere collecting attorney under very discouraging prospects.

The step was deemed a hazardous one by his acquaintances, when he added to his other expenses by undertaking the charge of a family in the city of New York, where, even at that early day, the maintenance of a rank and appearance necessary to command respect, required means far beyond his reach. The anxiety to fulfil an early matrimonial engagement, seemed, therefore, to have got the better of his prudence, when in 1796, he intermarried with Miss Lawrence, daughter of Mr. Thomas Lawrence, of Newtown, Queens County, (L. I.) This respectable lady, though not portionless, did not bring an accession to Mr. Wells' means of living, which would have prevented his future embarrassment under a less fortunate turn of his prospects, than afterwards followed. But she brought him what was more important: an intelligence; evenness of temper; patience and fortitude, which enlightened, sustained and smoothed his passage along an obscure and rugged path to fortune and eminence; illumined the gloomy period of adverse vicissitude, and cheered his rising hopes with the smile of sympathy and affection.

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constitution. I mention the ground upon which the decision should, in my opinion, be placed, with a view that the

There is nothing in Mr. Wells' history, manifesting that precocity of intellect, or those intuitive off-hand powers at the bar, which has produced so many instances of premature and rapid elevation, in the morning of manhood. Indeed, these are, in general, but equivocal arguments for a well earned and stable reputation. Too often does such a genius blaze forth with a fire and imagination sustained by very scanty materials, and exhibiting but a short-lived beauty. It glides before us like a meteor along the sky, till exhausted by the excess of its own brilliancy, it sinks in darkness, and is extinguished forever.

It is remarkable, that with Mr. Wells, possessing the strength which he afterwards exerted, not only the ordinary duties of his profession, but even his legal studies should have been rather a matter of necessity than choice. He has frequently been heard to declare, that previous to 1804, a snug farm and five hundred dollars would have separated him forever from his profession. He was attended with a modesty, a diffidence, an unassuming temper, which he overcame with the greatest difficulty; and it was with pain and reluctance that he commenced his career in the more public walks of his profession. That he entertained serious thoughts of abandoning it forever, between the years 1801 and 1804, there is little doubt; for it was during this period that he sought for and obtained the post of assistant editor to one of the newspapers in the city of New York.

Those warm political contests by which our country was distinguished during the period of his more retired labors, among the choice spirits which it called into action, did not leave Mr. Wells unemployed. His pen had been much engaged in the defence of his political friends and their measures, as well as in severe criticisms upon the measures and men of the adverse party, in the course of which he had produced several of the most respectable essays with which the newspapers of the day abounded. Few of these are preserved, (an event perhaps not to be regretted) and they were in no other respect useful to him than as exercises in composition. In this point of view they were much more so than is usual, from the hasty manner in which they are produced. But with him, having considerable leisure, and being determined to make them a source of improvement, he was able to bestow all the attention of an Addison upon the style of his productions. Almost the only flattering distinction which he had received from any of his party arose from this cause: The late General Hamilton, having read in the newspaper some very fine anonymous articles, traced the authorship to Mr. Wells. On this occasion, I am told, he ascertained his residence, sought him out, and complimented him for the genius he had displayed in the character of a political essayist. This flattering attention from the leader of his party, who was himself truly a model of fine writing in the same department, probably strengthened Mr. Wells' determination to turn editor. The employment afforded

question whether the Chancellor and Judges can act as counsel, may be definitively settled. The proposition of

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him a probable relief from the pressure of poverty ; and he believed himself more peculiarly qualified to shine in this than in any other pursuit.

There is an anecdote of Mr. Wells, relating to the period of his editorship, which, as it accords with his exalted character for morality during his whole life, may not be improperly inserted here. Mr. —, a friend of his, being invited to the field, at a period when the practice of duelling was deemed most genteel and fashionable, in the city of New York, called upon Wells to act as his second. This he very cheerfully and readily undertook ; but with a degree of adroitness almost without a parallel in those times, he succeeded in settling the dispute without a meeting, and this even to the satisfaction of those who entertained the greatest scruples whether the (then) rigid code of honor could be satisfied without blood or the brand of cowardice upon, at least, one of the parties. At a time when the laws of honor, like those of Draco, may be said literally to have been written in blood, it is no mean compliment to the dexterity of Wells, that he should have been enabled to compass such an object, in so satisfactory a manner. To distinguish away a trial by battle, pending between two hot political combatants of that era, by setting up an exception in the law, and convincing the Court of its existence, shows that he was not a proficient in the common law alone. "It may be truly said of him, (as of another eminent lawyer) that he could walk a narrow isthmus, between opposing doctrines where no man dared to follow him !"

The station of an editor, it may well be supposed, was the last which would inspire a confidence in the client, that his professional business, of an every day character, would be faithfully attended to ; and his ordinary income as a lawyer, small as it had been, was probably diminished by this circumstance. But in the end it proved what it is said the conduct of the Edinburgh Review was to the famous Scotch advocate, Mr. Jeffrey, "both friendly and hostile to him as a barrister." His after efforts at the bar showed him a splendid illustration of Lord Bacon's maxim, that writing forms the correct man. But this alone is not the most striking point of view in which it influenced his success as an advocate. It finally proved the direct and leading cause of bringing him before the public with that blaze of talent (long hidden by the force of adverse circumstances) which shone with a brightening lustre to the latest period of his life.

The late Mr. Cheetham, (at the time of which I am speaking) edited the leading paper of the majority. As such, he had recognized in Mr. Editor Wells, his most formidable antagonist in the political tournament. Cheetham had been prosecuted in the Supreme Court of this state, by Mr. W. S. Smith, the son-in-law of the late President Adams, for a libel, published in the "American Citizen," a paper then edited by Cheetham. This publication, which reflected very severely upon the conduct and character of Mr. Smith, a leading member of the minority, called forth their greatest animosity, embittered by their recent defeat in the state. En-

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Judge Betts affords an opportunity for making a final disposition of the point, which it is desirable should be done.

couraged by the hope of wounding, and perhaps prostrating their opponents, by the destruction of their favorite editor, they had arrayed against him a veteran host of talent, as one means of compassing their object. Cheetham and his friends perceived, that in justice to themselves, a force should be placed upon the defensive, qualified to meet and sustain the attack with the most formidable front, and the greatest possible firmness and effect. And though little hope was entertained of parrying or repelling it entirely, it was believed that proper arrangements would mitigate the blow, and prevent any decisive consequences which might otherwise follow the defeat. Reasoning from the force with which Wells had wielded the pen in the cause of the minority, Cheetham drew inferences directly the opposite to those of his friends; and contrary to their advice retained Mr. Wells as counsel in the defence. He went farther, and accompanied this retainer with a request that he should not consider himself the mere associate with the other very able counsel employed in the defence, but should take a leading part in the conduct of the trial. The cause was tried in the city of New York, (my informant thinks) in 1804. He did not, on this occasion, disappoint the high expectations which his very partial client had formed of him. His defence was able and masterly, exhibiting a strong, distinct and accurate view both of the law and the facts of his case, vindicating those enlarged and liberal boundaries which, founded in the constitution and policy of his country, limit the range of speech and of the press, in a manner which would not have derogated from the character of an Erskine. The result was highly favorable to the defendant. The damages were mitigated to a trifle, compared with what was confidently hoped on one side, and feared on the other; and a crowd of listening citizens, whom a deep interest in the event had drawn together, as spectators of the trial, were left to the full force of curiosity and wonder, on witnessing the astonishing and apparently preternatural metamorphosis which the young advocate had undergone. That a genius like his should have been left to plod on in the drudgery of the profession, for a period of thirteen years, in the city of New-York, nearly unnoticed and unknown, with employment so scanty as almost to have driven him from his profession in despair, seemed a reflection upon the audience, who had been listening to him with sensations of delight and admiration. But a few weeks, and even days, showed a disposition to atone for their neglect. A spirit of self-complacency, arising from a consciousness of his superior discernment, mingled with gratitude to Mr. Wells, for his faithful exertions in the defence, drew forth in the next American Citizen, one of the best of those pithy and energetic compliments to his young friend and counsellor, which Cheetham always knew how to bestow with the finest effect. These things were decisive of Mr. Wells' fate. The giant was aroused from his slumbers, and stalked abroad at noon-day.

WOODWORTH, J. Admitting there is no constitutional provision on the subject, I should hold it unfit for a Circuit

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From a stinted paucity of business and clients, whose visits had heretofore been "few and far between," he was daily retained in causes of greater or less magnitude. Engagements multiplied upon his hands, and he soon bade adieu to his editorial labors, and devoted himself exclusively to the bar. Yet he was the last to be persuaded of his powers, and he would occasionally relapse into those fits of self-distrust, which had been one great cause of so long withholding him from his proper rank in the profession. He was shortly after the trial of *Smith v. Cheetham*, retained as counsel to defend a cause in the Common Pleas of New York, a duty which he discharged in his finest manner. For this, he received a fee of five dollars. But unconscious of his strength, and rising reputation, he forgot that even this humble retainer was a debt due to his talents, and construed it into an act of marked kindness and regard on the part of his client. So grateful was he for what he considered a favor personal to himself, that he ever afterwards remembered this gentleman with the greatest friendship and affection; and in his more prosperous days, anxiously courted every opportunity of doing him a favor. Mr. Cheetham was never forgotten by him; and, I am told, that the gratitude of the counsellor extended itself to the children of the client, in various acts of patronage and protection, when their father was no more.

By leading a life strictly temperate and regular, Wells had overcome the frailty of his constitution, and attained a state of cheerfulness and good health; two important and essential requisites to sustain the amazing weight of professional labor which was about to devolve upon him. His rise was rapid; his practice became extensive and lucrative. He was snatched from want, and placed in easy circumstances, and an increasing reputation, both for talents and industry, promised him a proportional enlargement of business and profit. He availed himself, fully, of all these advantages. He pursued the study and the duties of his profession with unceasing assiduity. He furnished his office with a respectable library, which he was continually enlarging in proportion to his means. He appeared at the bar of the Supreme Court for the first time, in *Elting and others v. Scott and Seaman*, (2 John. Rep. 137,) in 1807, where he was sustained by his able friend and senior in the profession, Mr. J. O. Hoffman. Since that time his name is associated with almost every volume of our juridical history.

Having taken up his pen in the cause of the minority, which continued so, with very short intermissions, from 1801 to the present time, he, of course, standing identified with them, did not reap any of those advantages to which an active politician of his intellectual rank might otherwise have looked, as the reward of his labor. He was, (I am told) at one time, a Justice of the Marine Court during the temporary ascendancy of his party; but with this trifling exception, I cannot learn that he was ever, in the least,

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Judge to act as counsel. It would be plainly so in relation to the Chancellor or Justices of the Supreme Court; and I would make the rule universal.

indebted to office, either for the profits or the honors in which he has so copiously and deservedly shared.

In 1812, he was visited by a severe domestic calamity in the death of Mrs Wells, to whom he had always been very tenderly attached. He remembered her meekness, her kind attentions in adversity—she had shared in his prosperity without ostentation. Her death brought back to his mind associations which awakened his early woes—he was a man, and he mourned the bereavement. But he was a Christian, and he bade her adieu with a full persuasion that he should see her again; that she had gone to sleep for awhile, but would shortly awake to happiness forever.

He was married again in 1816, to Miss Huger, of the city of New York, daughter of Charles Huger, deceased, late of Charleston, (S. C.) a highly respectable and accomplished lady, who survived him, and still continues to reside with his children at the family mansion.

His health continued remarkably fine, and almost without intermission, till within three days of his death. On Wednesday evening, the 3d September, 1823, having been actively engaged in business during the day, he returned to his family, complaining of extreme weakness and languor, for which he said it was difficult to account, as he had felt its approach but for a few minutes. He continued in this situation during the two following days, with very little pain, but attended by a rapidly increasing debility. It was not till Saturday, the 6th September, that any fears were entertained of his approaching dissolution, either by himself or his family; and he expired a few minutes after these apprehensions arose, apparently falling asleep as if from mere fatigue or exhaustion.

Mr. Wells did not aspire to the character of an universal genius, and he undoubtedly selected his fort, or strong ground, when he commenced the study of the law. The foundations of his reputation in this department were, a mind naturally strong and comprehensive, improved by the usual classical studies, a critical acquaintance with English belles-letters, and a laborious systematic study of the common law, both in its theory and practice. He despised the character of a mere sciolist in his profession, the tame and idle spirit which wanders among glossaries, digests and indices, content with rules and principles in the abstract, without knowing how they ever have been or can be applied. He did not fear the imputation of being a case-lawyer, because he had traced the law to its ancient sources, by looking into and studying the cases themselves, instead of receiving them upon trust, on the authority of Blackstone, Comyn, or Bacon. He was a practical refutation of that quackery which holds any strength of mind in a lawyer, however great it may be, a safe substitute for study and authority. Accordingly, his library was early and extensively stored with books of common law, indiscriminately, as well as those which relate to the three

SUTHERLAND, J. Concurred.

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SAVAGE, CH. J. I think the constitutional ground the

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kindred and closely connected branches of international, maritime and commercial law. As a proficient in the latter, he was generally acknowledged to stand unrivalled at our bar. His law books and cases had a decided preference with him, though they by no means excluded the pursuits of various literature. He was pleased with the calls and attention of his friends, but study and business had ripened into a second nature, and so far from being a burthen, he could return to it, with zest, from the greatest delights of social intercourse. The transition from a state of high enjoyment and glee in the circle of friendship, to one of the most profound engagement and abstraction, did not appear to cost him a single regret, or a single effort.

The cause of his client was always an object of peculiar solicitude. This he never neglected. In addition to the general stock of knowledge which he brought to his aid, it uniformly underwent the most exact and scrupulous examination as to its particular features. No principle, no case bearing upon the subject, which his various knowledge and extensive library afforded, was omitted in the process. The evidence was weighed; the latent defects explored; and his opinions, in cases of doubt and difficulty, were seldom expressed till he had attained the point of certainty as nearly, perhaps as it could be reached by legal demonstration. His conclusions, thus carefully formed, were sustained by him before the various Courts where he practiced, with a firmness and boldness which pertained to a consciousness of their accuracy, and a learning eminently calculated to edify and aid the researches of the most enlightened and experienced tribunal. "He has," said the late Chancellor Kent, on hearing of his death, "been pouring instruction over my mind for fifteen years."

He was persuaded that the lawyer, though he has prepared his case by laying his premises, and proceeding to a conclusion in his own mind, has performed but the minor part of his duty. The operations of the closet have yet to withstand the criticism of some lynx-eyed adversary, and undergo the siftings and canvassings of the bench. Successfully to conduct his official auditors to the same conclusion, to simplify, to elucidate, to demonstrate, to convince, to transfuse his own ideas into the minds of others, to refute the arguments of opposing counsel, animated by convictions perhaps equally strong, and actuated by powers equally commanding, to detect the sophistries, dissipate the obscurities, obviate the doubts, and disentangle the subtleties in which zeal and ingenuity have involved the subject, or to meet all these by anticipation when the order of proceeding will not admit of a reply, was, in the important, intricate, and nicely balanced causes in which Mr. Wells was frequently engaged, and before the Courts where he usually appeared, one of the loftiest efforts of human genius. It was on occasions like these, "when the matter matched his mighty mind," when his highest

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true one; and I would refer the decision to this, instead of general unfitness. The section alluded to by Mr. Presi-

powers were truly put in requisition, that he justified the public in the rank which they had assigned him, of the most accomplished lawyer and eloquent pleader in the state.

In the discharge of his duty as an advocate, he generally avoided any thing like an exordium, and endeavored to lead his hearers by the shortest and most distinct rout to the real point in controversy. In doing this he was rarely unsuccessful. The mind was suddenly filled with his subject, stripped of every thing trifling and impertinent, or connected only with such agreeable associations as were calculated to interest his audience and fix their attention. His power of simplifying the most intricate cases has often been admired, and seldom, if ever, excelled. This enabled him to keep in constant view the strong points of his cause. He was a perfect master of the narration; his memory reached all its details; and when interrupted as having maimed or distorted evidence, the explanation which followed generally resulted in the most triumphant accuracy. In the distribution of his subject he was rigidly methodical, and his arrangement appeared to be the most natural and lucid of which it was susceptible. Indeed, he had no wish to perplex, entangle, or mislead; for he would not violate his own clear convictions; and having been cautious to be well persuaded in his own mind that the cause was with his client upon its ultimate merits, his arguments seldom rested on merely technical and formal grounds. If he became satisfied that his adversary could not be annoyed, unless by a professional *ruse de guerre*, operating in derogation of his plain and substantial rights, success in such legal legerdemain had no charms for him, and he either advised a compromise upon equitable principles, or withdrew from the controversy. He uniformly examined the whole range of discussion, and sought such a result as he believed would be reflected by the mirror of the law in its truth and purity. To this result he adhered with a Spartan firmness, which showed that he considered its maintenance not only a matter of private but of public duty. Hence he gave no countenance to uncertainty and innovation, by endeavoring to substitute the maxims of a fanciful morality for those of law; though where the legal rule which governed his case was doubtful, no one was better qualified by a philosophic view of its moral merits, to show which side of the scale should preponderate; and no one was entitled to assume a higher tone upon those questions which have been treated as belonging to the school of imperfect obligation. For,

Wells was a christian moralist. He had in early life made the doctrine of ethics, as refined and exalted by the promulgation of the gospel, the subject of a thorough investigation. The consequence was a profound sense of its truth and importance. And though he viewed its great and leading doctrines as extremely simple and easily applicable to the ordinary duties of life, he did not believe that one whose profession or extensive

dent, provides that "neither the Chancellor, nor Justices of the Supreme Court, nor any Circuit Judge shall hold

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connections in business was continually bringing under his review the conduct of mankind in its greatest variety, should content himself with the knowledge of its rudiments. He, therefore, regarded it as a part of his professional duty, to be well acquainted with the moral code. And if the effect of its doctrines upon his heart, and his practice in all the relations of life were to form the test of its excellence, the scoffs of scepticism would be silenced forever, and the maniac ravings of the atheist regarded as doubly insane. He was a most severe and critical judge of his own conduct. He looked upon religion as intended to regulate our intercourse with one another here, by adding to the ordinary sanctions of temporal morality the rewards and punishments of another life, "according to the deeds done in the body." His sense of duty was formed upon this foundation, and improved into a habit; so that he presented one of the finest models of every thing excellent in private life, and brought with him an astonishing weight of character to the bar. He thought it his duty to make a public profession of religion. Satisfied that the creed and practice of the English Episcopal Church were the nearest in accordance with his views, as being the most liberal and enlightened of any which prevailed among the various, though respectable denominations of christians in this country, these circumstances determined his preference. For several years before, and at the time of his death, he was a member of Grace Church, in the city of New York. But he was a professor of religion—not a party professor. In relation to all other christians, professing or otherwise, he was mild and tolerant. Amidst bitter railings, sectional accusations, harsh epithets, vindictive jealousies, obstinate diversities of sentiment in matters of trifling moment, adding fuel to schism and arguments to infidelity, he stood a firm, unshaken example of forbearance, candor and charity. And while he lived the life and maintained the character of a sincere and pious believer, he was humble and unobtrusive in his opinions, content and happy that his "serious thoughts should rest in heaven."

"As some tall cliff that lifts its awful form,
Swells from the vale, and midway leaves the storm,
Though round its breast the rolling clouds are spread,
Eternal sunshine settles on its head."

I have noticed the morals of Mr. Wells in this place, because they entered much into his character as an advocate. His language to all others, so far as their religious creed came into question, was precisely that of our constitution: "You may be right, and I may be wrong." Hence no one could be less assuming, less dogmatical, less the practical sectarian. But this very circumstance rendered his rebuke of every palpable deviation from the plain standards of moral conduct, the more awfully stern and severe; and gave double point to these fine strains of moral reasoning sometimes resorted to by him, either with a view to strengthen the legal inference for which he had been contending, or to elicit, explain or rectify

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any other *office or public trust*." I am aware there is a decision of the Supreme Court, upon the same question

a point left in doubt by the obscurity, inaccuracy, or discrepancy of the books, or the total absence of authority. On these occasions he was truly inimitable. While with his own master hand he led you back to the infancy of the common law, traced the various operation of moral causes which gave it birth, and growth, and maturity, and threw a blaze of light over that which had been hidden in the darkness of ages, you almost confounded the advocate with the awful voice of Justice herself, teaching to her own tribunals the first principles upon which her laws should be administered.

He was an orator of the first order. "A man may be called eloquent," says Doct. Goldsmith, "who transfers the passion or sentiment with which he is moved himself, into the breast of another. An intimate persuasion of the truth to be proved, is the sentiment and passion to be transferred; and who effects this, is truly possessed of the talent of eloquence." Perhaps no man was ever a more perfect illustration of this definition than Mr. Wells. Having devoted himself to the forum, the talent which he cultivated with the greatest assiduity, and with the most complete success, was that of ratiocination; and there is no doubt that this formed the predominant character of his eloquence. Yet he was seldom uninteresting, even in his most ordinary efforts; and he was far from being fettered to the dry details of business-like discussion, when not strictly required by the matter under consideration. Nature had given him all the vehemence, the fire, the mirth, the wit and the pathos which characterize so many of the bar in the country of his European ancestors; but it was the study of his life to master his native propensity, and make it give place to a substitute ordinarily more useful and efficient in the labors of the forum. He so far succeeded, as never to overact, but always measure the exercise of these interesting qualifications strictly by the nature of the subject. Yet though the ground which he trod was that of the philosopher, the lawyer, the logician, he delighted to pluck the flowers which sprang spontaneously in his path, while he trampled with disdain the far-fetched and tawdry exotic. He could laugh out of countenance the foibles and follies of mankind; and meanness, treachery or fraud, touched by his sarcasm, intolerably pointed and severe, started into their naked deformity. Sometimes you might see affectation or hypocrisy writhing under the lash of his irony, and when called to act in the cause of oppressed and suffering humanity, he awoke into the liveliest action all the strings of the soul.

But his arguments were usually conducted with direct and sober earnestness, and so framed as to convince rather than amuse. Sometimes they were terse and condensed; at others full and illustrative; and though he was occasionally pointed and sarcastic, he was commonly gentle and conciliating. His candor and integrity often drew the warmest sentiments of approbation and respect from opposing counsel. In his opening, he proceeded with slow, regular and deliberate movements, co-

arising under the *duelling law*, (a) that an attorney or counsellor, as such, does not hold an *office* or *public trust*, with-

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cupying as he advanced, such strong, distinct. and well fortified positions, directly on the road to his object, as led you along a safe and a willing follower, and prepared you at once to echo his conclusion. The whole bore so much the appearance of study, system and preparation, as induced you at times to place his great strength in this department, and to doubt his powers of reply. You were deceived. He could not only seize on the most opposite arguments almost intuitively, and wield and fashion them as circumstances or inclination directed; but he was prompt, skilful, and decisive, in meeting, at every point, the various assaults of adverse ingenuity.

(a) 20 John
Rep. 492.

He had a masterly manner of clothing a long chain of connected ideas in the choicest language. His voice was flexible, under good management, and easily accommodated to the sentiment he was desirous to express; of a fulness and compass which enabled him to discuss a question for a long time, and in the most animated manner, without faltering or hoarseness; and so clear and loud as to render one sitting near him slightly uneasy from the weight and pungency with which it fell upon the ear. It was naturally forcible and commanding; and its softer tones of mild persuasion were evidently the result of cultivation and discipline.

In his person, Mr. Wells was slightly above the middle size. He bestowed greater attention upon its neatness, and his dress was more fashionable and better adjusted, than is generally deemed consistent with his habits of study and abstraction. His form was erect, solid, firm, well proportioned, and apparently fitted to endure great muscular exertion. His features were regular; and his complexion, which was somewhat lighter than might be expected to accompany his glossy-black hair, his dark eyebrows, overshadowing a pair of keen, full and black eyes, was tinged with a glow of good health. Nature had probably thrown into his countenance something which physiognomy would call an air of archness, cunning and subtlety; but this had long since been subdued to the bold open front of honor and integrity. In the excitement of debate, his eye sparkled with peculiar lustre, and his whole countenance beamed with intelligence. Engagements of less importance, or the hour of total relaxation from business changed these appearances only in degree, and superadded a composure, mildness and benignity, which would have led the philosopher or the philanthropist instinctively to have sought him out as a brother.

Of all men, perhaps, he was the least trained "to set his looks at variance with his thoughts." His countenance uniformly proved traitor to the workings of his mind. I am told by a gentleman who was for many years clerk of the circuit and sittings in New York, that he could always discover, through this medium, Mr. Wells' confidence or want of faith in his cause; that, on some dark feature coming out against his client, he would turn to him with a look of suspicion, and demand, in a peremptory under-tone, "Sir, how can you explain this to me?" His high cultivation of the

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in the meaning of the constitution ; but the same question lately arose before the present Chancellor, who, after the fullest consideration, arrived at a different, and to me a satisfactory conclusion. I am of opinion, that an attorney

moral sense rendered him a most miserable advocate for a client who failed to satisfy him that he deserved his aid ; but this very circumstance imparted to him a zeal, acuteness, and perseverance in the vindication of what he was persuaded to be right, or in the refutation of what he believed to be wrong, which, sustained by his high powers as a lawyer and orator, rendered him as safe an advocate as justice herself could desire.

His gestures were easy and dignified : his delivery natural, firm and well accented, occupying that happy medium between slowness and impetuosity, which gave to every word its full and distinct pronunciation, and dealt to every sentence its proper measure and emphasis ; so that with his perspicuity of arrangement and expression, no speaker could be more easily understood. There was nothing like hesitation, "recalling or re-casting of sentences as he went along ;" but, on the contrary, he was perfect master of his language as well as of his subject ; and the occasional grandeur of his peroration, showed him no less the towering and sublime, when his subject called for it, than he was, on ordinary occasions, the forcible and argumentative speaker.

Such is the life, such the death, such the character of Mr. Wells. Perhaps no man in this country ever reached the same elevation and occupied so large a space in the public eye, upon the mere footing of professional eminence and individual worth. "Men of talents in the United States," it is said, "are generally bred to the bar ;" and it is not to be denied that there are many of these who have stood, and who now stand as high in the public estimation as Mr. Wells ; that the influence of their talents and character has been equally benign, and much more extensive, than we are entitled to claim for him ; and, consequently, that their reputation filled a wider region. Such, perhaps, were many of those who have departed before him ; among whom were a Hamilton, a Parsons, a Dexter, a Pinckney, a Livingston. Yet how far the high offices which these great men held at various periods, and the disposition of the different political parties in which they figured to make the most of their leaders may have entered into the formation of their characters, it is indeed impossible to determine ; but it is not dealing unfairly with their memory when we make great allowance for the force of such circumstances. These adventitious causes had no agency in the fortune and character of Mr. Wells. He stood alone—the architect of his own greatness. The wreath which he wore was not won in a race with plebian competitors, for he was a master spirit in the ranks of the American bar—the talent and the intellectual enterprize of the Republic—noble and generous rivals, who yielded him, with common consent, and with cheerfulness and pride, the honors he had achieved.

or counsellor does hold *an office or public trust*, within the sense of the constitution.(b)

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(b) IN THE CASE OF DANIEL WOOD.

Before SANFORD, Chancellor.

In this case, it became a question, what oath or oaths should now be required from solicitors and counsellors, upon their admission to the bar. If the station of a solicitor or counsellor is an office or a public trust, the oath to be taken is prescribed by the new constitution, and no other oath can be required. If this station is not an office or a public trust, the oaths heretofore required must be taken.

THE CHANCELLOR.—So far as the legal profession is an occupation open to all, there is no reason to consider a lawyer as a public officer. The exercise of his profession is, in part, an occupation, in which every person is free to engage ; but it is not so in respect to proceedings in the courts of justice. These proceedings are, according to our laws and usages, conducted by a distinct class of men, especially appointed for this service. The practice of the law, in the courts of justice, is permitted only to those who are appointed by the courts : the persons appointed are subject to the control of the courts ; and they may be deprived of their right to pursue this occupation. These regulations evidently consider the practice of the law in the courts as a part of the administration of justice ; as a function, important not merely to private parties but also to the public. They are regulations, which are supposed to be necessary or conducive to a good administration of public justice. The admission of an attorney, solicitor or counsellor, is a general appointment to conduct causes before the courts : This station, thus conferred by public authority, has its peculiar powers, privileges and duties ; and this station thus becomes an office in the administration of justice.

Attorneys, solicitors, and counsellors, are constantly denominated officers of the courts by which they are appointed. Our laws have required that upon their admission, they should take a particular oath for the faithful discharge of their duties ; and that oath is termed by the legislature itself an oath of office. In this, as in other regulations, the legislature have considered and treated persons appointed to practice the law, as holding a species of office.

The oath of office prescribed by law for attorneys, solicitors and counsellors, is still requisite, if it is not superseded, by the existing constitution ; and either that oath, or the oath of office established by the constitution, must now be taken. If this station was an office before the adoption of the existing constitution, it is an office still ; and if it is an office under the laws of the state, it is an office in the sense of the constitution.

The constitution of the union requires, that all executive and judicial officers of the United States, and of the several states, shall be bound by oath or affirmation to support that constitution. The supreme court of the United States have directed that counsellors and attorneys admitted to practice in

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SANFORD, Chancellor, concurred with the Ch. Justice.

Seymour
v.
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SUDAM, Senator, concurred with Mr. Justice Wood-
WORTH.

THE REST OF THE COURT were of opinion, generally, (without mentioning the particular ground upon which they decided,) that a Circuit Judge should not appear as counsel in this Court; and the hearing of the cause was postponed to the next session, to the end that other counsel might be retained, and prepared to argue for the respondents.

that court, shall take an oath or affirmation to demean themselves uprightly, and also to support the constitution of the United States: Rule of February term, 1790, and rule of February term, 1791. Attorneys and counsellors are thus considered, by that court, as officers of the United States, under the national constitution: and the terms of that constitution, "executive and judicial officers," are also the terms of the constitution of this state. This is not only high authority, but it is also most direct authority, upon the question, now arising here; the oaths to be taken by public officers being the subject of regulation in both constitutions, and the words used in both being the same. It is not to be doubted, that the same terms have the same meaning in both instruments; but if such a doubt could arise, it must vanish, when we perceive that the constitution of the state, in establishing the oath to be taken by officers of the state, includes also the oath to support the national constitution: thus, incorporating the two oaths, and making them applicable to the same persons and cases.

The terms "office and public trust," have no legal or technical meaning, distinct from their ordinary signification. An office is a public charge or employment, and the term seems to comprehend every charge or employment in which the public are interested. The words public trust, still more comprehensive, appear to include every agency in which the public, reposing special confidence in particular persons, appoint them for the performance of some duty or service. The obvious intention of the existing constitution is, to establish one oath for all officers and for every public trust; and I am accordingly of opinion, that the oath so established, must be taken, and consequently, that no other oath can be required.

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v
Knickerbocker.COLDEN, plaintiff in error, *against* KNICKERBACKER, defendant in error.

A writ of error to the supreme court will not lie upon a judgment by default.

And if brought, the proper course is neither to affirm nor reverse the judgment below ; but dismiss the writ of error.

In error, to the supreme court, upon the coming in of the usual return, containing the judgment roll only—

The plaintiff in error alleged diminution, viz. that there yet remained in the court below, a *capias*, return, filing, rule to plead, for default, interlocutory judgment, for reference to the clerk to assess damages, for report thereon, and for final judgment, a declaration and common bail piece, &c. ;

And prayed and had a certiorari to the court below, upon which transcripts of all these proceedings were certified.

Form of *alleging diminution*, and the *certiorari* in such case.

Upon the return to the certiorari, the plaintiff in error objected, not only error in the roll, but certain irregularities in the proceedings below, viz.

That the defendant below (plaintiff in error) did not appear in the court below ; that his name in the *capias* and the subsequent proceedings were different ; that there was a material variance between the declaration and roll ; that common bail was irregularly filed ; that the *capias* was returnable at a late day in term, and yet the declaration was entitled generally, &c.

And error in the roll was also insisted on, viz. that the declaration contained a count upon a promissory note, with the common money counts ; and yet the clerk assessed damages generally, whereas he should have assessed upon the count on the note only.

And 12 of the court were for dismissing the writ of error, and, therefore, did not consider whether the above matters could be alleged for error, or not.

But 8 of the court were opposed to dismissing the writ of error :

Yet they were of opinion that none of the above matters were sufficient cause for reversing the judgment ; and, therefore, it should be affirmed.

Semble, therefore, that these, and the like omissions and mistakes, not appearing upon the roll, are matters of irregularity—not error ; and are the proper subjects of redress by motion in the court below :

And, *semble*, that it is not *erroneous* or *irregular* for the clerk to assess general damages on a judgment by default upon a declaration containing a count upon a promissory note, and the common money counts.

Where the plaintiff took his judgment by default, omitting, by mistake, to

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er

file common bail, the supreme court, on motion, allowed him to appear for the defendant *nunc pro tunc*. Per Sudam, senator, interrupting the argument for the defendant in error.

IN error to the Supreme Court. The action in the Court below was *assumpsit* by Knickerbacker against Colden.

The return to the writ of error contained, as usual, the judgment record only, by which it appeared that the plaintiff below declared against the defendant upon a promissory note, alleged to have been given by the defendant to one Squires, or order, for \$570 54, dated Sept. 21, 1820, and payable one year after date. The declaration, as appeared by the record, also contained the common money counts. Judgment passed against the defendant by default upon all the counts; and, as it further appeared by the record, the damages of the plaintiff were assessed by the Clerk, generally, and without distinguishing between the special and general counts.

Upon filing this return, the plaintiff in error alleged diminution thus :

“ And the said plaintiff, Cadwallader R. Colden, comes here into this Court, for the trial of impeachments and the correction of errors, by Aaron Burr, his counsel, on this 6th day of September, 1822, at the Capitol, in the city of Albany, and suggests and alleges to the said Court, that there is remaining before the Justices of the people of the state of New York, of the Supreme Court of Judicature of the same people, a record of judgment in favor of the defendant in the above cause, who was plaintiff in the said Supreme Court, against the said plaintiff in this Court, and also a *capias*, *return*, and *filing*, the *rules to plead*, for *default*, for *interlocutory judgment*, for *reference to the clerk to assess damages*, for *report thereon*, and *rule for judgment*, the *declaration* and *common bail piece*, the *affidavits*, as well on the part of the plaintiff as on the part of the defendant, on a motion made successively in the terms of May and August, 1822, to set aside the default, and the *rules* or *orders* made thereon by the Court, the transcript whereof is not certified and returned with the writ of error depending in this

Court ; and thereupon the said plaintiff prays a writ of certiorari to be issued to the said Justices of the said Supreme Court, commanding them to certify the transcript of the said record and proceedings so remaining before them."

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Whereupon a certiorari issued in these words :

" *The People of the State of New York*, by the grace of (L. s.) God, free and independent, to our Judges of our Supreme Court of Judicature, Greeting :

Certiorari
thereupon.

WE being willing, for certain causes, to be certified of the proceedings in a certain cause, lately depending in our Court before you, by our writ between John Knickerbacker, jun. plaintiff, and Cadwallader R. Colden, defendant of a plea of trespass on the case ; and of the judgment thereupon obtained in our said Court, do command you, that the transcript of the proceedings in the said cause, to wit, the *capias*, *return* and *filing*, the *rules to plead*, *for default*, *for interlocutory judgment*, *for reference* to the clerk to assess damages, *for report* thereon, and *rule* for judgment, the *declaration* and *common bail piece*, the *affidavits*, as well on the part of the defendant as on the part of the plaintiff, on a motion made successively in the terms of May and August, 1822, to set aside the default, and the *rules* or *orders* made thereon by the Court, with all things touching the same, by whatsoever name the parties may be called therein ; you send to our President of the Senate, Senators and Chancellor of the state of New York, in the Court for the trial of impeachments and the correction of errors, distinctly and plainly under the seal of our said Supreme Court, before you, and this writ, *forthwith*, so that we may do thereupon what of right, and according to the form of the statute in such case made and provided, shall need to be done. Witness, JOHN TAYLOR, Esq. President of the Senate, at the Senate Chamber, in the Capitol, in the city of Albany, on the 6th day of September, one thousand eight hundred and twenty-two.

John F. Bacon, Clerk."

The return of this writ consisted of the transcripts required by the certiorari, excepting the *affidavits* used upon the motions in the Court below.

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From these it appeared that the plaintiff in the Court below was named in the *capias*, *John Knickerber*, but the *ac etiam* and the subsequent proceedings in the cause were in the name of *John Knickerbacker*; the *date of the note* set forth in the *declaration*, was Sept. 21, 1821, and thus varied from that mentioned in the record; and the note being payable, as set forth in the declaration, one year after date, *would not fall due under nearly a year after the commencement of the suit.*

The *capias* was returned and filed Nov. 6, 1821; and the plaintiff filed common bail, and a declaration, and entered his rule to plead, on the 29th of the same month.

The *capias* was returnable the 27th day of October, 1821, and the declaration was entitled of October term, generally, of that year. The term commenced on the 15th of Oct. The plaintiff entered a default on the 3d Jan., 1822; and a rule to assess damages upon all the counts. Now, all these matters were insisted on for error, as well, as the *general* assessment of damages. And accordingly,

S. M. Hopkins, for the plaintiff in error, stated the following points:

1st. That the *capias* is in the name of *John Knickerber*, but the subsequent proceedings are in the name of *John Knickerbacker*.

2d. That Colden did not appear in the suit, either by filing bail, or in any other mode as required by law; the common bail piece filed by Knickerbacker, on the behalf of Colden, having been filed contrary to the statute, and therefore void.

3d. That from the showing of Knickerbacker in his declaration, he had no cause of action against Colden, at the time of the commencement of the action or at the time of entering judgment therein.

4th. That there is a variance between the declaration and the judgment record in this: that in the declaration Knickerber counts on a note made in 1821, whereas in the judgment record no such note is mentioned, but a note alleged to have been made in 1820.

5th. That the matters and causes of action alleged and set forth in the second count of the declaration, are triable and determinable only by a jury; but that, nevertheless, the whole matter contained in the declaration was referred to the Clerk, who reported thereon.

6th. That the declaration is of October term, *generally*, referring to the *first day* of the term, although, from the showing of Knickerbacker, his writ was taken out after that day, and was returnable on the last day of the term.

He said, it is true, that a part of the objections are of form. Many errors may be called so, which are yet of vital importance. Matters of form are essential, to enable parties to avail themselves of their rights; and there is no safety for a defendant, if the plaintiff is allowed to travel entirely out of the ordinary course of judicial proceedings. Here the plaintiff's name is wrong, and there was no chance for the defendant to appear in a right name.

The plaintiff having brought the defendant into Court, should have allowed him a regular time to appear. Not having done so, the proceedings are intrinsically erroneous. The *capias* was returnable the 27th of October, and the plaintiff filed common bail on the 29th of November following. The defendant did not appear at all. Finding a judgment against him, he has a right to look to the continuity of the proceedings. The declaration relates to the first day of the term, and in judgment of law was put into Court before the return day of the process.(a) Had the plaintiff sued in his right name, he had no authority to file common bail, until forty days after the return of the process. The statute(b) is conditional, "that in cases where special bail may be required, if the defendant shall not cause the same to be given within double the time required for that purpose by the rules of the Court, it shall be lawful for the plaintiff to file common bail for the defendant." The 40 days, which are double the time allowed for pleading in the Supreme Court, did not expire till the 6th of December. The 20 days' time for appearing in that Court ran from the 27th of October, the return day of the writ. This formality should have been strictly complied with. The plaintiff can, in no case, in the Supreme Court, file common bail till after 40 days from the second week of term.(c) But the plaintiff has not only ap-

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(a) *Vene-
bles v. Daffe*,
Carth. 113, 14
(b) 1 R. L.
324.

(c) *Lane v
Cook*, 8 John
359.

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(d) *Doe v. Butcher*, 3 T. R. 611. *De-lanoy v. Canon*, 10 East, 328. *Smith v. Painter*, 2 T. R. 719.
(e) 1 R. L. 522, s. 15.

peared for us out of time, but he appeared for us at the suit of a person not named in the process. It is settled that he cannot do this even after the double time for appearing has expired.(d)

The plaintiff then declared upon a note payable nearly one year after the action was commenced; but when he comes to make up the record, he corrects the date, and makes it payable one year earlier.

The rule that the Clerk assess damages, generally, upon all the counts, is a substantial error, and decisive of the cause. The defendant's right to have the damages assessed by a jury have been wholly disregarded. The only exception to this right is by statute,(e) when a judgment by default, demurrer, or confession, is given upon a written contract for a sum certain. Wherever there is the least uncertainty in the damages, the law always calls for the intervention of a jury. The same thing is required by the most sacred rights of the parties. This very point was decided in the case of *Burr v. Waterman & Wells*, on error from the Mayor's Court of New York to the Supreme Court, M. S. May term, 1821.(f) The statute authorizing an assessment by the Clerk, in any case, is at best in derogation of a common law right, and should be construed strictly.

(f) *BURR v. WATERMAN and WELLS.*

Writ of error
to the court of
common pleas.

SUPREME COURT, of the term of October, in the year of our Lord one thousand eight hundred and twenty. The people of the state of New York have sent to their Judges of the Court of Common Pleas, called the Mayor's Court, in and for the city and county of New York, their writ close in these words, to wit: "The people of the state of New York, by the grace of God, free and independent: To the Judges of our Court of Common Pleas, called the Mayor's Court, in and for the city and county of New York, Greeting. Because, in the record and proceedings, and also in the giving of judgment in a plaint, which was in our Court of Common Pleas, called the Mayor's Court, before you, without our writ, between Joshua D. Waterman and Ralph Wells against Aaron Burr, of a plea of trespass on the case, manifest error had intervened, to the great damage of the said Aaron Burr, as, by his complaint, we are informed—we, being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment should be thereupon given, then you send to our Justices of our Supreme Court of Judicature, distinctly and openly under your seal, the record and proceedings of the plaint aforesaid, with all things concerning the same, and this writ, so that they

J. L. Viele & A. Van Vechten, contra. The defendant will contend, that the judgment of the Supreme Court ought to be affirmed, for the following among other reasons :

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may have them at the Academy, in the town of Utica, in the county of Oneida, on the third Monday of October next, that the record and proceedings aforesaid, being inspected, we may cause to be further done thereupon for correcting that error, what of right and according to the law and custom of the state of New York ought to be done. Witness, AMBROS SPENCER, Esquire, our Chief Justice, at the city of Albany, the 19th day of August, A. D. 1820.

Fairlie, Bloodgood & Breeze, Clerks.

G. Marsh, Att'y."

The answer of the Judges of the Court of Common Pleas, called the Mayor's Court, within named. The bill and record, whereof mention is within made, together with all things touching or concerning the same, to the Justices of the Supreme Court of Judicature of the state of New York, at the day and place within contained, under our seal distinctly and openly, we send, in a certain schedule to this writ annexed, as within to us commanded.

Return.

Benj. Ferriss, Clerk.

MAYOR'S COURT. Pleas, &c. [The return set forth the judgment record in the court below, *verbatim*. The *placita* was of June term, 1820. The bill of privilege contained a count in *assumpsit*, upon a promissory note given by Burr, the defendant below, to Waterman & Wells, the plaintiffs below; the common counts for money lent, money had and received; and a count on an *insimul computassent*. The record then set forth an *imparlance* to August term, 1820, and an interlocutory judgment of that term, and then proceeded thus:] "And because it is suggested, and proved, and manifestly appears to the said Court here, that the said plaintiffs have sustained damages, by reason of the not performing of the promises and undertakings in the said bill mentioned, to 162 dollars and 12 cents, besides the costs and charges by the said plaintiffs about their suit in that behalf expended—

Therefore it is considered, that the said plaintiffs do recover against the said defendant, their damages by occasion of the premises, to 162 dollars and 12 cents, by the Court here assessed, and also 22 dollars and 21 cents for the costs, &c.

Afterwards, to wit, in this same term, before the Justices of the said People of the Supreme Court of Judicature of the same People, at the Academy in the town of Utica, in the county of Oneida, comes the said Aaron Burr, by George Marsh, his attorney, and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said Joshua D. Waterman and Ralph Wells to have or maintain their aforesaid action thereof against the

Assignment of errors.

Insufficiency of declaration

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1. Because the plaintiff in error could have had complete relief, as to every error complained of, in the Court below, and by neglecting to apply there, has waived those errors, if they are such.

General as-
signment of
errors.

Diminution
alleged.

No warrant of
attorney ;

Nor rule to as-
sess damages.

Writ of certio-
rari prayed.

Conclusion.

Certiorari, to
certify the
warrant of at-
torney, and
rule for assess-
ment of dama-
ges, if to be
found, &c.

said Aaron Burr: There is also error in this, to wit, that by the record aforesaid, it appears, that the judgment aforesaid, in form aforesaid given was given for the said Joshua D. Waterman and Ralph Wells, against the said Aaron Burr; whereas, by the law of the land, the said judgment ought to have been for the said Aaron Burr, against the said Joshua and Ralph. There is also error in this, to wit, that by the record aforesaid it appears that the said Joshua and Ralph appeared by Daniel S. Griswold, their attorney, against the said Aaron Burr, in the plea aforesaid; nevertheless there is no warrant of attorney filed, or remaining of record in the said Court of Common Pleas, called the Mayor's Court, in and for the city and county of New York, between the parties aforesaid, in the plea aforesaid, to warrant the said Daniel S. Griswold to be attorney for the said Joshua and Ralph, against the said Aaron Burr, in the plea aforesaid. Therefore, in that there is manifest error. There is also manifest error in this, to wit, that there is no rule or order in the said Court of Common Pleas, called the Mayor's Court, authorizing the Clerk to assess the damages between the parties aforesaid; that the same were assessed contrary to law: And the said Aaron Burr prays a writ of the people of the state of New York, to be directed to the Judges of the Court of Common Pleas, called the Mayor's Court, in and for the city and county of New York aforesaid, to certify to the said Justices of the people of the Supreme Court of Judicature of the same people, the truth of the same, and it is granted to him, &c. And the said Aaron Burr prays, that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c. which said writ of *certiorari*, so prayed and granted, follows in these words, to wit: "The People of the state of New York, by the grace of God, free and independent: To the Judges of our Court of Common Pleas, called the Mayor's Court, in and for the city and county of New York: We being willing, for certain causes, to be certified whether Joshua D. Waterman and Ralph Wells made Daniel S. Griswold their attorney of record against Aaron Burr, of a plea of trespass on the case, before you, our Judges of the Court of Common Pleas, called the Mayor's Court, in and for the city and county of New York aforesaid, of the term of June, A. D. 1820, and also whether there be any rule for assessment of damages between the said parties, or not—Do command you, that having searched the files, entries, memorandums, and other remembrances of the rules, and warrants of attorney, for the city of New York aforesaid, being in your custody of record, what you shall find therein concerning the said rule and warrant of attorney, or either of them, between the said parties of the plea aforesaid, you certify to our Justices of our Supreme Court of Judicature

2. Because none of the errors relied upon lay the foundation for a writ of error in this Court.

3. Because all the errors complained of by the plaintiff, if any exist, are cured by the statute of jeofails.

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without delay at the City Hall of the city of New York, fully and entirely as the same remain in your custody, and this writ, &c. Witness, AMBROSE SPENCER, Esquire, our Chief Justice, at the Capitol, in the city of Albany, the 13th day of January, A. D. 1821.

Fairlie, Bloodgood & Breece, Clerks.

G. Marsh, Att'y.

The answer of the Judges of the Court of Common Pleas of the city and county of New York: Searching the files, entries, memorandums and other remembrances of the Court within named, we do not find any warrant of attorney in the within mentioned cause, on file. Searching also the files, entries, memorandums, and other remembrances of the said Court, we do find a memorandum of a warrant of attorney, endorsed on the bill filed in the said cause, in the words following, to wit: "City of New York, ss. Joshua D. Waterman and Ralph Wells put in their place Daniel S. Griswold, their attorney, against Aaron Burr, gentleman, &c., in a plea of trespass on the case." And we do find rules for interlocutory judgment, and that the Clerk assess the damages, entered in the term of July, one thousand eight hundred and twenty, as follows, to wit: "On motion of Mr. Griswold, attorney for the plaintiff, *ordered* interlocutory judgment, and that the Clerk assess the damages." And this we, the said Judges, certify to the Justices of the Supreme Court of Judicature of the people of the state of New York, within named, as we are within commanded.

Per Curiam, John L. Broome, Clerk.

And hereupon, afterwards, to wit, on the 1st Monday of January, as yet, of January term, A. D. 1821, (*in nullo est erratum*, and continuance, by *curia advisare vult*, to May term, 1821.)

SPENCER, Ch. Justice, delivered the opinion of the Court. The error assigned, and principally relied on, is, that there being several counts—one on a note of hand for the payment of money, given by the plaintiff in error to the defendants in error, and other counts for money lent, money had and received, and upon an *insimul computassent*, the defendant below having made default in pleading, the attorney for the plaintiffs below took interlocutory judgment, and a rule that the Clerk assess the damages, without having entered a *nolle prosequi* on the other counts than the one on the note. Upon *certiorari* it appears there was no rule for a *nolle prosequi*.

The objection is fatal. (1 R. L. 522.) There is no right or authority in the Court below, to direct an assessment upon the money counts, or the *insimul computassent*. These the plaintiffs below have not relinquished. They are

Return to the
certiorari.

No warrant of
attorney.

But a memo-
randum of a
warrant.

And rules, &c.

Judgment er-
roneous, *ne*
nolle prosequi
having been
entered on the
counts, other
than the count
on the pro-
missory note;
and the rule to
assess damages
and assessment
and judgment
thereon, being
general.

There can be
no assessment
of damages by
the clerk, on

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(f) Art 5, s

This is an attempt, by a writ of error, to correct mere clerical mistakes, without first applying to the Court below for their correction. But by adverting to the constitution, (f) it will be seen that this Court, was formed for the purpose of revising errors in the actual decisions of the Supreme Court. The Justices of the Supreme Court are required, on writ of error, to assign the reasons by which they were guided in the judgment of the Court below. But these errors all passed on in silence; and the Court were never called to pronounce upon them, though perfectly competent to administer relief. Why did the defendant omit to apply to that Court? Shall he be allowed to delay and keep silence, during the whole round of this proceeding there, and then come here to correct errors, which he never brought to the view of the Supreme Court? That Court have given no decision upon these matters, within the meaning of the constitution, as is plain from the nature of the objections. The mistake of the name, the variance between the declaration and record, the mistake in filing the common bail piece, and the general assessment of damages, &c., are all matters of which the defendant ought properly to have availed himself in the Court below. The error in the name could not mislead; for the name is right in the *ac etiam*. The defendant probably knowing the plaintiff's demand to be just, lies by till the judgment is perfected. He doubtless knew of the irregularity, but if not on discovering it, he should have gone to the Supreme Court, where the fact of his knowledge could have been tried on affidavit. The delay, after a knowledge of his rights, should defeat his application to set aside the proceedings, and would have had this effect by the rules of that Court.

the common
money counts,
or on an *in-*
mul computas-
sent

as much part of the claim, as the note; and *non constat*, that the damages have not been assessed on these counts. The authorities cited by the plaintiff in error show that a *nolle prosequi* should have been entered, or it is error.

Judgment reversed

[SUDAM, Senator. Will error lie for a mere irregularity? I had supposed it would not. The usual course is to seek redress by motion in the Court below.]

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Hopkins, said he was not prepared, at this moment, to say, upon authority, that error would lie; but he insisted that every *irregularity* is *error*. *Error* is a generic term; and includes not only those defects apparent upon the face of the record, but every omission or mistake in proceeding to judgment, which would be a ground for setting it aside in the Court below.

Viele & Van Vechten, denied that every irregularity is technically an error, so as to be the subject of a writ of error. But suppose it to be as contended on the other side, at any rate, these matters should have been suggested to the Court below, in order to warrant a writ of error. In *Sands v. Hildreth*,^(g) on appeal from the Court of Chancery, the Chancellor stated that the appellants never appeared at the hearing to make a defence, in consequence of which, his decree was given as a matter of course, on the default of the defendants below. This Court, therefore, dismissed the appeal. This was on the ground that the merits had not been reviewed in the Court below, through the neglect of the appellants. In *Gelston and Schenck v. Hoyt*,^(h) the defendants below joined in demurrer to their special pleas, but when the demurrer was called upon the calendar, they made default, and judgment passed without argument; and this Court, for that reason, refused to hear the demurrer argued here. The reasoning of the Chancellor, in that case, applies most emphatically, to these matters of irregularity. "It is, (says the Chancellor,) ⁽ⁱ⁾ an unfair proceeding; for it takes from the party demurring, an advantage which he would have been entitled to in the Supreme Court, if the inclination of that Court had been against him of withdrawing his demurrer, and replying to the pleas. So of all matters of irregularity. The Court below will exercise a discretion, when their attention is called to them, in amending or overlooking them altogether, or setting aside the proceedings according to the various circumstances of such

^(g) 12 John
493.

^(h) 13 id
361.

⁽ⁱ⁾ Id. 576

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(j) 17 John.
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case. A writ of error deprives us of all these advantages. In *Henry v. Cuyler et ux.*(j) this Court quashed a writ of error brought by the defendant below, who had demurred and suffered judgment against him upon the demurrer by default, although the same question had been determined against him in another cause ; and the cause was brought here by consent of counsel.

If the doctrine of these cases is sound, the writ of error in this case cannot be sustained. In cases of irregularity, the objection must be made at the first opportunity which offers. This is not only the rule of law, but it is required by common justice. It is unjust to lie by in silence, for months and years, till the cause has gone through all its forms, and then surprise the party by a writ of error, or appeal, even after an execution satisfied. All the irregularities in the proceedings below are thus waived by the party entitled to object. The inference is, that he means to acquiesce, on the judgment being against him according to the course of the Court. This action was upon a promissory note. Perhaps the very reason why the Court below was not applied to, was because the irregularity had been waived by delay, and there were no merits upon which to found the application.

(k) Tidd. Pr
124, 5, and
cases there ci-
ted.

But suppose error will lie, where the party has suffered a judgment by default, it does not follow that every mistake is the proper subject of a writ of error. Will error lie for an imperfection, of which a party cannot avail himself in pleading ? The *capias* does not appear upon the record ; and when it is defective, it is almost a matter of course to amend it in the Court below. A mistake in the name is amendable.(k) It would be a libel upon justice, to say that every little slip of an attorney or clerk is to ground a writ of error. These the Courts will always correct, and they are never taken advantage of in practice, except for the purposes of legal chicanery.

If the party will come here upon these matters, this Court will, at least, hold him to the rules which govern in the Court below. Here is a delay since Nov. 29th, 1821, to make an objection to the mode of appearance. The defendant now comes in and says, "I have never appeared.

On my neglect to do this, the plaintiff had a right by statute to appear for me. But he did this prematurely ; and thereby took away my right to appear at all." We deny the consequence. We did that which was a part of the defendant's duty ; and which he has altogether neglected. If we appeared for him out of season, he should have treated our act as a nullity, and appeared of course, or got rid of our irregular appearance upon motion, and then have come in by his own act. The defendant should have moved in this case, to set aside the proceedings before the next term.(1)

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[SUDAM, Senator. I remember a case in the Supreme Court, in which I was concerned as counsel, where the plaintiff went on and took his default by mistake, without having filed common bail at all, and the defendant had not appeared in any way. In that case, the Court considered the filing common bail a mere matter of form, and allowed the plaintiff, on motion, to appear for the defendant, *nunc pro tunc*.]

(1) *M Evers*
v. *Markler*, 1
John. Cas. 428.
Jones v. Dun-
ning & Doe,
2 id. 74.

The objection that the declaration was of October term, generally, is merely technical, and if it could be urged as irregularity, either here or in the Court below, it is clearly amendable. But, according to the reasoning on the other side, it is *no* objection. It is said the caption relates to the first day of term, and thus in contemplation of law, precedes the return day of the *capias* ; but it is not denied that it also extends to every other day in the term, including the last, or return day, as well as the first. These cases of relation to the first day of term are frequent in our judicial proceedings. They depend, however, on a fiction of law, which is always moulded to the purposes of equity.

Variance between the declaration and record cannot be objected here. The record is right ; and this is the only evidence of the proceedings below. As between this and the declaration, the record should govern. The very reason why the defendant did not go to the Supreme Court was, probably, because the record gave the true date of the note, We venture to predict that this Court will have business

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(l) 1 R. L.
522, s. 15.

enough, and not of a very pleasant nature, if they once consent to take cognizance of petty irregularities like this.

The damages were properly assessed by the Clerk. The declaration contains one count upon a promissory note. To this the money counts are superadded, which is the usual case in declaring upon a note. The statute(l) provides that when judgment by default is given in any action upon any promissory note for the payment of money, the Court shall direct the Clerk to assess the damages. These general counts are as good upon a promissory note, as a count setting forth the note itself. Do they not, then, come within the language of the statute? An action containing these counts may properly be called an action upon a promissory note. But if error, it is a matter which the Court below should have been called upon to correct.

If the note is misdescribed in the declaration, the plaintiff must then resort to his money counts. In such case he must give proof of the note to the Clerk within the 18th section of the act. (1 R. L. 523.) The Clerk is in such case required at the request of either party, to reduce the evidence to writing, and report it to the Court specially, who are to pass upon its competency—so that no danger can arise from his assessing damages upon the money counts.

[SUDAM, Senator. The usual practice in England is, I believe, to enter a *remittitur* as to the general counts, when the damages are assessed by the Clerk.]

Velie & Van Vechten, referred to *Shepherd v. Charter*,

(m) 4 T. R. 275. (m) *Messin v. Massareene*, (n) *Rashleigh v. Salmon*, (o) and *Andrews v. Blake*, (p) to show the distinction between the practice in England, and that of this state. (q) In England, it is matter of practice. It does not, as here, depend upon a statute provision. It will be seen from the cases cited, that there the paper upon which the assessment takes place, must as matter of practice, be spread upon the record. But with us this cannot be important. The party has notice of the assessment, and may appear and oppose any extravagant or otherwise improper assessment.

(n) Id. 493.

(o) 1 H. BL

252.

(p) Id. 529.

(q) Vid.

Tidd. Pr. 515.

In a note to *Longman v. Fenn*,⁽ⁿ⁾ a case is cited from Fitz-G. 162,⁽¹⁾ where the Court of K. B. refused to set aside the judgment, because the writ of inquiry did not appear upon the roll.

The legislature, conscious that formal errors, not affecting the merits, might be committed, passed the statute of *amendments* and *jeofails*.^(o) To give this statute complete effect, the courts do not wait for an actual amendment ; but where the error alleged is merely formal, they consider the amendment as already made ; or overlook it as having never existed. This principle has been frequently acted upon.^(p)

Hopkins, in reply. There is no doubt that, if the defendant had voluntarily appeared, or his judgment had been after verdict, many of these errors would have been amendable. But gentlemen forget that this is not an application to amend. It is a proceeding on an issue of *in nullo est erratum* upon multiplied irregularities. The course pursued on the other side was unexpected, and has driven me to a course of research so sudden and desultory, that it is difficult to methodize the authorities which I must use in reply. Almost every volume of law mentions the distinction between faults curable and incurable by verdict and *nil dicit* ; but perhaps we must search in vain for an authority to show, that all the mistakes and omissions which we complain of, would not be cured by the default. It would be difficult to find an adjudged case in favor of bringing an action of debt upon a bond ; and it is so in relation to several of the errors assigned. Much has been said of the justice of the plaintiff's demand. But this Court are called upon for a decision which is to form a precedent upon a record brought here for adjudication on its validity, and in which specific errors are assigned. The Court are confined to the face of the record. They will not yield to a course of argument which will make every thing uncertain, and

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(n) 2 H. Bl
543.
(o) 1 R. L
117.

(p) *Richardson v. Backus*, 1 John. 59. Tidd's Pr. 664, and Cas. Temp. Hardw. 43, 44. *Cheetham v. Tillotson*, 4 John Rep. 499.

(1) This is *Mallory v. Jennings*, in Fitz-G. It was held that the want of an award of a writ of inquiry upon the roll, in assumpsit, was cured by the statute of amendments.

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render it impossible to advise what course shall be taken upon a given state of things appearing of record.

May not a writ of error be brought upon irregularity, or error in the intermediate proceedings? If not, what becomes of the multiplied distinctions in the books between errors curable and incurable, under the statute of *amendments* and *jeofails*? In Tidd's Pr. 102, authorities are cited, showing that the want of an original writ is aided by a verdict, though otherwise of a defective original. It is there said, that if an amended original is returned on certiorari, it will save the verdict, though it were originally defective. But in this case no amendment is pretended. We are at issue upon the error as it stands. As was remarked by an honorable Senator, the Court below might have ordered common bail filed *nunc pro tunc*, to save the proceedings, but they were never asked to do this; and if the doctrine contended for here is to prevail, the statute of common bail is a nullity.

Lilly's Entries, 221 to 292, present a series of precedents in which errors are assigned in the intermediate proceedings in the cause. Many of these are in mere matter of form, but notwithstanding taken for granted to be error unless amended. The want of a warrant of attorney, or the appointment of a guardian, no venire, no original and the like, are treated as fatal errors, unless amended below and shown to be perfect by a return to the certiorari.

Error will lie upon a judgment by default. *Salkield v. The Ld. William Howard*, (q) is an express authority, and in Serjeant Williams' note to *William v. Gwyn*, (r) it is said that error will lie by the heir upon a judgment in a real action. In *Edwards v. Blunt*, (s) it is decided that after a judgment upon demurrer, there could be no motion in arrest, but agreed that it would be otherwise after a judgment by default. In *Creswell v. Packham*, (t) judgment was given silently, and without argument, upon demurrer, and the Court say that a motion in arrest cannot be heard, but they agreed that error would lie.

The cases showing what errors are fatal after a judgment by default or upon verdict, are cited in 2 Dunl. Pr. 705.

(q) Cro. Jac.
547.
(r) 2 Saund.
46, n. (6)
(s) 1 Str.
425.

(t) 6 Taunt.
840.

Lilly, 221, assigns for error that the original was *clausum fregit*. The judgment was not reversed because the error was not amendable, but because it was not in fact amended. The same, 234, assigns for error, that an original and *capias* issued before the cause of action accrued. This shows that error may be assigned in the mesne process as well as in the original. The same author, 236, gives an assignment of errors that there is no writ of inquiry, in opposition to the case cited on the other side from H. Blackstone and Fitz-Gibbon. Error was assigned that the defendant was in the Fleet, and no declaration, served upon him.^(u) To serve the declaration personally, in that case, was a statute duty in England,^(v) as filing common bail was here. In this as in that case, the defendant is not in Court, except for the purpose of a particular mode of proceeding; and the party must keep within the terms of the statute. Error was assigned in the admission of a *prochein amy*;^(w) and in *Phillips v. Smith*,^(x) error was assigned for want of almost all the intermediate proceedings, which were amended and certified.

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(u) Lill. Ent.
246.
(v) 4 & 5
W. & M. c.
21.

(w) Lill.
Ent. 289.
(x) id. 254
to 268.

All the arguments *ad captandum* such as that we should have stood upon our guard, and watched and amended, fail before these authorities. We were not thus bound to play the guardian for the plaintiff's attorney. What are lawyers' forms and precedents for? What but to preserve the boundaries and barriers by which legal proceedings are to be kept regular? And is not the party to see at his peril, that his proceedings are regular? Suppose a lawyer files a judgment roll without any previous or intermediate proceedings: it is said by gentlemen that we cannot go beyond the record itself. In such a case the clerk on error returns a regular record; and if we are thus confined, no judgment can be reversed. An opportunity to set it aside has perhaps gone by in the Court below. A notice of the motion may not have been signed; or the party may have delayed his application, for some cause which the Court below, in the exercise of its discretion, may not think sufficient to excuse the delay; must the party sit quietly down and submit to the sacrifice of his whole estate, perhaps from a mere

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slip of the pen? Suppose a *ca. sa.* had been the first proceeding in this case. We might as well be asked, "why did you not appear and defend the action?" in that case as in the present one. The *capias* was void and we were not bound to notice it.

(y) Col. Cas.
41r

Has the constitution altered the settled order of things which we have been considering? Is so important a change to be introduced by mere implication? If so, would not a substitute have been provided? We had early adopted the English statute of *amendments* and *jeofails*, which presuppose that writs of error will lie upon judgments by default on grounds which the statute professes to cure. After the adoption of that statute, in *Price v. M'Evers*, (y) error was brought to this Court upon a judgment by default against the defendant in the Supreme Court, (*this very case*) upon a mere miscast of sixpence in the *in toto attingens*; and the writ was holden to lie; though the record was amended upon the defendant in error paying all the costs. Here, though the party may be permitted to amend the formal errors, the Court cannot allow an amendment of the errors in substance; the prematurity of the suit, and the mis-assessment of the damages.

This is not a proper occasion on which to make the objection that error will not lie upon a judgment by default. It should come upon motion to quash the writ of error. It is remarkable, that at a previous term a motion for such an order was made and refused, in this very cause, as I have been informed.

Viele. With permission, I must correct the gentleman in his statement as to the result of that motion. It is true, that such a motion was made; but it was not passed upon, because the late Chancellor was absent. It was merely suggested by an honorable member of the Court, that the cases upon the authority of which the motion was made, did not apply to this case.

Hopkins. Surely the suggestion was correct. Those cases do not apply to errors which the opposite party himself has committed; but merely to cases where the cause

is put at issue, and the party makes default at the hearing.(z) They have been cited on this occasion; and are either defaults in arguing demurrers, or at a hearing in the Court of Chancery when the cause is called upon the calendar.

That it is fatal on error, if it appear by the record that the cause of action arose after the commencement of the suit, the Court are referred to *Cheetham v. Lewis*,(a) *Venables v. Daffe*,(b) the note to *Barker et ux. v. Thorold*, (1 Saund. 40,) and *Warring v. Yates*.(c)

THE CHANCELLOR. All the proceedings in the suit in the Supreme Court being returned, it appears that judgment was entered against the defendant by default, and that the proceedings passed through the offices of the Supreme Court, silently, in respect to the Judges, who were never asked to correct any irregularity, or to afford any relief to the party, who now assigns errors in those proceedings. The writ of certiorari issued, in order to bring into this Court all the proceedings not stated in the record, required any affidavits used on a motion to set aside the default, and any rules or orders actually made by the Supreme Court thereon; but no such affidavit, rule, or order, is returned. The plaintiff in error, having made no application whatever to the Supreme Court, for any redress, now asks this Court to reverse the judgment thus entered against him. The Judges of that Court not having, in fact, decided any question in the cause, have not given reasons upon this occasion.

If a defendant, making no defence in the Supreme Court, suffering a judgment to be entered against him by default, and making no application to that Court for any redress, might come before this Court and ask the same redress which that Court might have afforded, this Court would become, in effect, a Court of original jurisdiction, and would be employed in deciding questions which the Supreme Court had never determined. Such a course of proceeding would be inconsistent with the constitution, and pregnant with great mischiefs. The jurisdiction of this Court is merely appel-

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(s) *Cham-
ley v. Ld
Dunsany an-
others,*
2 Sch. & Lef
712, 713, p
Ld. Redesda
id. 719, 72
per L.
Carleton &
Erskine.

(a) 3 Joh
Rep. 42.

(b) Cart'
113.

(c) 10 John
119.

The case
stated.

Jurisdiction
of this court is

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y appel-

late. It is a jurisdiction to re-examine and re-judge ; to correct erroneous decisions actually made ; to affirm, reverse, or alter determinations made by Judges, who may give, and are bound to give reasons for their determinations. It is not a jurisdiction to determine, in the first instance, causes or questions which have not been submitted to the decision of other Courts. This separation of jurisdictions it is our duty to maintain. He who comes here to complain of errors must show not merely the formal proceedings which in a general course of practice may take place, without the knowledge of the Judges, and without any direction from the Court, in the particular cause, but he must also show some judgment or some decision, upon a question actually presented to the Judges for their determination.

Writ of error
upon a judg-
ment by de-
fault dismiss-
ed.

In this case, the plaintiff in error, not having submitted to the Supreme Court any of the objections which he now urges here, and not having made the least effort to obtain the decision of that Court, upon any one of those objections, he is not entitled to be heard in this Court. The proper disposition of such a case is, I conceive, not to affirm or reverse the proceedings, but to dismiss the writ of error.

BOWKER, BOWNE, BRONSON, CRAMER, DUDLEY, EARLE, GREENLY, HUNTER, PORTER, THORN and WHEELER, Senators, concurred.

SUDAM, Senator. This cause comes before the Court on a writ of error to the Supreme Court, and all the supposed errors assigned by the plaintiff, (except the 5th,) are those existing in the interlocutory proceedings in the Court below, and do not appear in the record. These proceedings (the *rapias*, declaration, &c.) have been brought into this Court, by a writ of *certiorari*, and three questions are presented for its consideration.

The questions
presented.

1. Whether this Court on a writ of error will take cognizance of mere irregularities in the Court below, which might be corrected there.

2. Whether this Court will sustain a writ of error to the Supreme Court, when the judgment in that Court has been

permitted to be taken by default, the error assigned appearing on the face of the record.

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3. When the assessment of damages by a Clerk of the Supreme Court, on a declaration containing a count on a promissory note, and *the money counts*, is authorized by our statute.

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I am satisfied that this Court ought not to take notice of mere *formal defects* in the proceedings of the Supreme Court. (*Cheetham v. Tillotson*, 4 John. Rep. 499.) It is for that Court to redress injuries which may result from a violation of its rules or practice, and it could not be tolerated that judgments in that Court should be reversed here, for mere mistakes in form, and in no wise affecting the merits of the controversy.

This court
will not notice
mere formal
defects, arising
from rules of
practice in the
supreme court.

2. The second question—whether the Court will sustain a writ of error in the Supreme Court, on a judgment by default in that Court, deserves to be seriously considered.

Whether er-
ror lies upon a
judgment by
default.

This point is presented by the counsel for the defendant in error, as a preliminary objection, and they contend that the writ of error *ought to be quashed*.

Is made a pre-
liminary ob-
jection.

In support of their position the counsel cited the case of *Gelston & Schenk v. Hoyt*, (13 John. 561.) In that cause the plaintiff below had demurred to two of the special pleas put in by the defendants, who joined in the demurrer, but *declined* arguing the demurrer before the Supreme Court, when the cause was called on, and permitted a judgment on the demurrer by default. That case differs essentially from the one now under consideration. The party had made his defence. He was in a situation to have taken the judgment of the Supreme Court upon the very question which he attempted to discuss in this Court, and he was very properly told it was an established rule, that a point waived by him in the Court below could not be open to discussion in this Court. He had himself abandoned that ground, and by this means misled his adversary, and deprived him of rights which the Supreme Court could have afforded him, had the demurrer been overruled. It was a *voluntary abandonment of a point* on which it was in his power to have taken the judgment of the Supreme Court, and if not satisfied, then to call

Cases cited to
support it.

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for the opinion of this Court. So, also, in the case of *Sander v. Hildreth*, (12 John. Rep. 493.) There the cause had been regularly set down for a hearing on bill and answer, and upon notice to the party, the appellant did not appear, but suffered a decree to pass against him by default. This Court dismissed the appeal, because he had voluntarily permitted a decree to pass against him, when he might have taken the judgment of the Chancellor on the merits of his cause. If he had taken his opinion, it might have been unnecessary to resort to this Court. Not having done this, he was presumed to have acquiesced in the justice of the judgment pronounced by the Chancellor, and this Court would not aid him in a course of litigation which he had once concluded to abandon.

A party who, on hearing, or notice, voluntarily withdraws himself from the deliberate judgment of the court, should not be heard on appeal or error.

Preliminary questions of this kind are always addressed to the sound discretion of the Court, guided by principles which have heretofore, and ought in future to govern Courts of appellate jurisdiction; and I fully subscribe to the doctrine, that a party who has placed his cause in a situation to receive the deliberate judgment of the Supreme Court or Court of Chancery, and who, upon a hearing, on notice, voluntarily withdraws himself from the deliberate judgment of the Court below, and permits his adversary to recover by his default, is, and ought to be precluded from agitating the same points in this Court.

But this is not the plaintiff's case.

But the case of the plaintiff in error is not within the rule laid down in the cases cited, nor is it within that established in the case of *Henry v. Cuyler*, (17 John. 469.) The plaintiff in error was prosecuted in the Supreme Court, and he did not appear to the writ. He permitted the plaintiff below to perfect his judgment, and he now says that there is error in that record. I cannot subscribe to the doctrine, that to enable a party to maintain his writ of error, (which is a writ of right,) it is necessary that he should *appear* and *litigate* the suit in the Court below. He *may rest* on the honesty and integrity of the plaintiff, and presume that he will not enter a judgment for a greater sum than is justly due. But he may find himself egregiously deceived. A judgment may have been entered against him for \$10,000, when only

\$100 was due. And shall it be said that, in such a case, he cannot take advantage of the errors of his adversary, to reverse an unjust recovery? This may be stating an extreme case, but a moment's reflection will suggest a variety of cases in which the greatest injustice might be effected, and the injured party without a remedy, unless his writ of error is secure to him. If he appears in the suit below, he then takes into his own hands the estimate of his rights. If he *waives* them, it is his own act, and he ought to be concluded. But if he trusts to the plaintiff, if he does not place any obstacles in his way to a speedy recovery, and he afterwards finds that the plaintiff himself has so conducted the suit, that in judgment of law his proceedings are erroneous, he is, in my opinion, entitled to the judgment of this Court upon the *record*.

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Upon the face of all our records the judgment recorded is that of the *Court*: and I can see no constitutional objection to sustaining this writ of error. A judgment by default is as much the judgment of the Court, as that on a verdict, or after argument on a case made. The words of the constitution are, (Art, 5, s. 1,) "And when a writ of error shall be brought on a judgment of the Supreme Court, the justices of that Court shall assign *the reasons for their judgment*."

A judgment by default is as much a judgment of the court as if rendered on a verdict.

Where is the difficulty in the Justices of the Supreme Court assigning the reasons of their judgment? In the case of *Gelston v. Hoyt*, before cited, Chief Justice Spencer assigns, as the reason for the judgment, that "when the cause was called, (meaning the issue joined on the demurrer,) the defendant's counsel appeared and declined to argue. Whereupon judgment was given for the plaintiff, on the defendant's counsel declining the argument." Upon these reasons, assigned by the Chief Justice, it appeared the plaintiffs in error had waived, in the Court below, that part of their defence which was embraced by the demurrer, and this Court justly held them to it.

And the supreme court may assign reasons for it.

In the case now before the Court, on the 5th error assigned, (which is the only one appearing on the face of the record) there could be no difficulty in assigning the reason why

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the Court referred the matter to their Clerk, to assess the damages. In the act (1 R. L. 134, s. 7) organizing this Court, and regulating the course of its proceedings, it is declared that this Court shall "examine all such errors as shall be assigned or *found in such record*, or in any process or proceedings concerning the same, and *call upon* the Judges of the Supreme Court to assign the reasons of such judgment."

Writ of error not confined to cases actually argued in the supreme court.

I cannot discover, either in the language of the constitution, or in the words of the statute, that the writ of error can be supported in those cases only which are *actually* argued before the Justices of the Supreme Court.

Cases of great hardship and injustice might arise, in which the party would be without a remedy, unless it be true that a writ of error to the Supreme Court can be maintained on a judgment or decision of that Court upon interlocutory proceedings, (such as motions to set aside judgments for irregularity, &c.)

Error will not, in general, lie upon a decision on a question of practice, arising upon affidavit in the supreme court.

If I understand his honor the Chancellor, his opinion is, that such would be the proper course, and it may be supposed that he is supported by the judgment of this Court, in the case of *Clason v. Shotwell*, (12 John. Rep. 31.) I concur in the opinion of the Court on the *very point* necessarily decided in that cause. *It went far enough to reach that individual case*, which formed an exception to the general rule. But I must dissent from the reasoning which would seem to go beyond the case then under consideration. This Court has never, as yet, said that a writ of error can be brought upon the opinion of the Supreme Court on a case presented to them by affidavits, and arising out of the practice of that Court, and I trust they never will so pronounce the law.

Error was brought in this court, on a judgment by default, in *Cheetham v. Tillotson*, 5 John. 430.

I am entirely supported in my opinion by the case of *Cheetham v. Tillotson*, (5 John. Rep. 430.) That was a writ of error on a judgment in a Supreme Court, by *default* and *damages assessed on a writ of inquiry*. The *error alleged* was, that the *charges in the declaration were not libellous*. The learned counsel. (*Woodworth & Henry*) who argued the cause, never raised a doubt as to the jurisdic-

tion of this Court, though the excitement produced by that controversy was well calculated to elicit all technical objections to the writ of error. The *judgment* of the Supreme Court was reversed.

From a review of all the authorities, I am satisfied that the established rule of this Court is, to deny to a suitor the right of litigating questions *here* which *he had placed in a situation to receive the judgment of the Court below*, and which he had, *on the hearing there, voluntarily abandoned*; and that, with the exception of the case of *Clason v. Shotwell*, this Court have never sanctioned a writ of error, to review the decisions of an inferior Court, pronounced on affidavits, and that this was a case *sui generis*, and ought not to be *extended beyond the precise point there decided*; that the case now before the Court is within the authorities cited; and that the writ of error ought not to be quashed for the cause assigned.

When a judgment is taken by default, the party puts himself upon the *regular proceedings* of the plaintiff, and he never can be said to waive that to which he never assented, or in which he never was an actor. Nor can this Court exclude a case of palpable error, (when such a case shall be presented,) merely because the defendant below did not appear in the suit. It would in my opinion, violate the first principles of justice, as well as the words of the constitution, and the law by which this Court is organized.

3. This leads me to the consideration of the 5th point made by the plaintiff in error—that the declaration containing a count upon a promissory note, and the money counts, the damages ought to have been assessed *by a jury*, and not by the *Clerk of the Court*.

The decision of this question does not depend upon the English authorities. By the 15th section of the “act for the amendment of the law, and the better advancement of justice,” (1 R. L. 522,) the Court is authorized, in certain cases, on a judgment by default, to refer it to their Clerk to assess the damages. By the 17th section, if the suit be on any bill of exchange, *promissory note*, &c., truly set forth in the declaration, the execution of such bill or note. &c., need

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nying appeals
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This case not
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And why.

General as-
sessment of
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not be proven. By the 18th section the Clerk is authorized to take proof and to *reduce the testimony of witnesses to writing* ; and, if required, to report the same to the Court. Now it is a well settled principle that a promissory note may be given in evidence under the money counts. So may the Clerk assess damages on an *account stated*. The assessment of damages by the Clerk being authorized by law, disposes of this point; for we are to presume, (after judgment,) that the necessary proof was given to him, to justify his report. Upon the coming in of that report, the judgment entered upon it is the judgment of the Court.

Our statute enlarges the English rule of reference to the Clerk, and embraces cases in which it would, in England, be necessary to execute a writ of inquiry.

I am, therefore, of opinion, that the judgment of the Supreme Court ought to be affirmed.

For dismissing
the writ, 12;
For affirming,
8.

ERWIN, LEFFERTS, LIVINGSTON, LYNDE, MCINTYRE,
REDFIELD and WOOSTER, Senators, concurred.

It was thereupon ORDERED, ADJUDGED and DECREED, that the writ of error brought in this cause be dismissed this Court, and that the plaintiff in error pay to the defendant in error his costs in defending the writ of error, to be taxed, and that the record be remitted, &c.

THE NEW YORK FIREMEN INSURANCE COMPANY
against
DE WOLF.

Insurance, by the defendants, on a cargo, at and from New York to Havana, and at and from thence to Lagaira and Porto Cavello, or either of them, at a premium of seven per cent. to return five and a quarter per cent. if the risk ended at H., without loss, or two per cent. if only one of the two other ports was used, and the risk ended without loss: warranted American property. The cargo, consisting of flour and pork, was

purchased of the plaintiff a native American citizen residing in New York, by L., a Danish citizen of St. Thomas, then in New York, under a contract entered into here, by which the plaintiff agreed to deliver the cargo to L., at Havana, or at Lagaira, or Porto Cavello, at five per cent. advance on the invoice, or cost, paid by the plaintiff, and the freight, and premium of insurance, paid by the plaintiff. The cargo was consigned, by the plaintiff, to Spanish merchants, at Havana, (designated by L.,) with instructions to dispose of the cargo, for the plaintiff's account, &c., or to send it to another market, that is, to a windward port. The bill of lading expressed, that the cargo was shipped for the account and risk of the plaintiff, to be delivered at Havana, to H. & C. or their assigns, paying no freight, it being the property of the owner of the vessel: On the arrival of the vessel at Havana, the consignees interlined the bill of lading with the words, "or a market;" and directed the master to proceed to Lagaira; and while proceeding to Lagaira, the vessel was captured, near that place, by a Venezuelan privateer, and carried into a port in the island of Margarita, and the vessel and cargo libelled in the admiralty court there, and the cargo condemned as prize, &c.

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In an action on the policy to recover for a total loss: *Held*, that the cargo was, and remained the property of the plaintiff, until its delivery at one of the ports mentioned; that there was no delivery, or acceptance of it, at Havana; and that the consignees there, in directing the master to proceed to L., acted as agents of the plaintiff, who continued to be, and was the owner of the cargo, at the time of its capture; and that, therefore, the warranty was complied with.

That such a contract of sale is legal and valid, both by the municipal law of this country, and by the law of nations, and does not destroy the neutral character of the property.

That the plaintiff was not bound to disclose to the defendants the facts and circumstances of the contract; for even if they were material, yet the insured is not obliged to communicate any fact, as to which there is a warranty, express or implied.

Where, on a sale of goods, no time is stipulated for the payment, the price is to be paid on their delivery to the purchaser.

Provisions shipped by a neutral, with a view to supply the army or navy of a belligerent, are not contraband of war.

On the contrary, such a destination is perfectly lawful.

The right of neutral and peaceful states, to carry on commerce with countries at war, excepting in contraband articles, and with places in a state of blockade, is perfect and unquestionable:

Though the question may frequently arise whether the contract is a fraudulent disguise, to give to the property the character of neutrality during its transit; and whether the property, in truth belongs to the neutral or the enemy.

The principle of the law of nations, laying out of view the case of contraband articles, and of places actually invested, is, that the property of a neutral, in its passage to a country at war, is free; and that the property of the adverse belligerent is subject to capture and forfeiture.

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It is settled that the sentence of condemnation by a foreign court of admiralty is not conclusive, but only *prima facie* evidence of the facts upon which it purports to have been founded; and this court will not hear an argument in favor of its being conclusive.

Other points were discussed by counsel, but not decided, viz.

1. Whether our courts will recognize a war between a colony and the mother country, as a lawful war, before the independence of the former is acknowledged, either by the mother country or our own government.
2. Whether a colony, being acknowledged independent, is bound by the treaties existing between the mother country and foreign nations.

ERROR from the Supreme Court. The facts appear sufficiently in the report of the same case in the Court below. (20 John. Rep. 214.)

The reasons for the judgment of the Supreme Court were assigned as in 20 John. 225 to 229.

D. B. Ogden, for the plaintiff in error. We rely on the following grounds for a reversal of the judgment rendered by the Court below :

1. The cargo of the brig *George Washington*, upon its shipment at New York, became the property of Moses E. Levy, and its delivery, if not complete at New York, became so at Havana.

2. The voyage insured by the policy in this case, terminated at Havana.

3. The cargo of the *George Washington*, at the time of the capture and condemnation, was not American property, within the terms and meaning of the warranty contained in the policy.

4. The contract under which the cargo was shipped, was calculated to increase the risk, and, therefore, ought to have been disclosed to the under-writers, as ought also the letter of instructions from the assured to the master, and the letters from the assured to Hernandez & Chavita.

5. The transaction was a mere cover to belligerent property, and was, therefore, a fraud upon belligerent rights.

6. The sentence of condemnation is conclusive evidence that the cargo was not American property, and so the Court ought to consider it.

The two letters of July 21, 1818, are relied upon to prove the contract between De Wolf & Levy. It was made at a

period of open war between the Spanish government and the republic of Venezuela ; which was declared as long ago as July 30th, 1811,(a) and has continued to rage ever since that time. This, though carried on between the colony and the mother country, was a lawful war after that day, on which her declaration of independence was dated. (1 Nile's Reg. 125.) In *Ware v. Hilton et al.*,(b) Chace, J. says, "Before our acts of separation from the crown of Great Britain. the war between Great Britian and the United Colonies, jointly and separately, was a civil war ; but instantly on the declaration of independence, the war changed its nature, and became a public war between independent governments ; and immediately thereupon all the rights of public war (and all the rights of an independent nation) attached to the government of Virginia.

The President's message of Dec. 6th, 1817,(c) speaking of the character of war, says, "the United States have regarded the contest, not in the light of an ordinary insurrection or rebellion, but as a civil war between parties nearly equal, having, as to neutral powers, equal rights. Our ports have been open to both, and every article, the fruit of our soil, or of the industry of our citizens, which either was permitted to take, has been equally free to the other ;" and in *The United States v. Palmer et al.*,(d) Ch. Justice Marshall lays down the rule that the proceedings of our Courts of Justice in relation to a part of a foreign empire, which asserts, and is contending for its independence, must depend entirely on the course of our government.

All our Courts, then, are bound to treat the war as an existing and lawful one. The Executive is the judge by whose decision this Court is bound to abide ; and I shall proceed upon the foundation that this contract was made at a time of lawful war between the people of Venezuela and the King of Spain.

Who were the parties to this contract ? De Wolf was an American citizen : Levy, being resident in the Spanish island of St. Thomas, must be considered as a Dane. The brig left New York, and proceeded on her voyage to supply the Spanish government with provisions, either at Havana or Porto Cavello, the two great naval depots of

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(a) 1 Nile's
Reg. 105, 121
no. 7, 8.

(b) 3 Dall
224.

(c) 13 Nile's
Reg. 236.

(d) 3 Wheat
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(e) 2 John.
Cas. 180.
- Spain in the neighborhood of Venezuela. Can property shipped under such circumstances, destined as it was to aid Spain in her unholy efforts against Venezuela, be considered American? What is the meaning of this warranty? Ch. Justice Spencer says truly, in giving the opinion of the Court below, "It means that the property was American by the law of nations." It is said in *Vos & Graves v. The United Insurance Company*,^(e) that "it is a settled rule that the insured, in order to comply with his warranty, must not only maintain the property to be neutral, but so conduct himself towards the belligerent parties, as not to forfeit his neutrality. He must pursue the conduct, and preserve the character of a neutral." In *Fitzsimmons v. Newport Insurance Company*,^(f) Marshall, Ch. J. remarks, "It is contended by the counsel for the underwriters, that a ship warranted to be American is impliedly warranted to conduct herself during the voyage as an American, and that an attempt to enter a blockaded port, knowing it to be blockaded, forfeits that character." *This position cannot be controverted.*
- The question whether the warranty is complied with, then, is not confined to the strict and narrow principles of the common law; but depends upon the law of nations. The true inquiry is whether the property be neutral. The answer to this question comes most properly from the Courts of admiralty, which, as remarked by Kent, J.^(g) "are especially received as binding; because they proceed upon general principles of the law of nations, applicable to all suitors, and of universal extent and reception. They are governed by one and the same law, equally known to every country, and equally open to all the world." In *Duguet v. Rhineland*,^(h) Radcliff, J. says, "I am of opinion, that the warranty of American property ought to be construed in reference to the belligerent parties. It was intended that the property should be neutral *in regard to them*." Kent, J. in the same case says, "I think that the warranty of neutrality must be considered in reference to the law of nations, and the true question, is it to be considered a *Frenchman* or an *American according to that law*? It is immaterial how he was considered in France, or by the municipal law, because
- (g) In Lud-**
low v. Dale, 1
John. Cas. 18.
- (h) 1 John.**
Cas. 360.

the parties, by the true construction of the contract had in view a protection on the high seas, under the sanction of the general law." So here, this contract was not only made in time of war, but in express reference to that war. If in time of peace, there was no need of the warranty. The parties meant something by it; and the language of the insurers is, "Because a war does exist, we will not risk the property, being American. We claim the protection of the law of nations upon it as American property." Was it protected by the law of nations? If it was so protected, the warranty is complied with; otherwise it is violated. The cargo was flour and beef, shipped under a contract with the Spanish government to supply their army or navy, to aid in carrying on the war against Venezuela. Independent of authority, I ask every man of common sense, whether if captured by Venezuela, it would be protected as American property? Had this property been shipped under similar circumstances to supply the British army while at New York, during the revolutionary war, would not our Courts of Admiralty have condemned it? Were we at war with another country, would not our Courts of Admiralty now do it? Let our Courts beware how they pronounce property thus circumstanced, beyond the reach of condemnation. We may commend the poisoned chalice to our own lips. If our country is attacked, it will be from abroad. Our invaders must be supplied by provisions from abroad, which may always be secured against condemnation by the intervention of a neutral, and an executory contract of sale. No case can be found warranting neutrals in such extravagant claims.

But we shall be told that the defendant in error was innocent, that he knew nothing of the object for which the purchase and shipment were made. We answer, it is immaterial whether he knew it or not. He has made a full warranty, and in so doing has taken the knowledge upon himself. He was bound to know the object of the voyage. The warranty was intended to throw the risk upon him. It is a novel doctrine that ignorance shall operate as a protection where there is a breach of an express warranty. In the case of a mere implied warranty of sea-worthiness, know-

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ledge is never material. Why does a contrary doctrine apply here? Is there any difference in principle between the two cases? An express warranty is always binding in all cases, whether the warrantor know it to be true or false.

But suppose knowledge to be necessary. De Wolf had full notice. It is an established principle in equity, and acknowledged in all the books, that circumstances sufficient to put a prudent man on inquiry, is equivalent to notice. Such circumstances exist in the present case. Both parties to the contract of sale were neutral. It was natural for De Wolf to inquire of Levy, "Why do you wish the cargo to retain its character of American property?" A Danish character would have answered the same purpose. Levy was a merchant of St. Thomas. For what purpose did he wish a cargo of flour at Havana? Why not ship it in his own name? Having such multiplied causes for suspicion, it is impossible that De Wolf should not have been put upon inquiry, and finally have known all about this affair. Every document shows that the cargo was not, in fact, shipped in the name of De Wolf, and every appearance in favor of the cargo being De Wolf's, is evidently a mere cover to the transaction. The letters which treat it as his property, and under his direction, were known and approved, and two of them were signed by him. He directs it to different markets, and assumes the disposition of the property as if it was to pass at his own risk, although he had previously sold it to Levy. He states in his letter to the consignees, that the cargo was to be sold on his account, whereas it was to be delivered to Levy, and it was immaterial to De Wolf what end it came to. Why lend himself to cover the transaction in this manner, if he did not know the object?

The property was rightfully condemned. Although, as between the parties, the payment may be contingent, depending on the delivery of the property, which remains at the risk of the neutral, and such a contract may be lawful in peace, yet it is otherwise during war. In the case of *The Sally Griffiths*,⁽¹⁾ the Court say, "It has always been the rule of the prize Courts, that property going to be de-

(1) 3 Rob.
Adm. Rep.
300, in note.

livered in the enemy's country, and under a contract to become the property of the enemy, immediately on arrival, if taken *in transitu*, is to be considered as enemy's property." It is hardly possible to find a case more similar to the present than that of the Sally Griffiths. The property in that case was shipped under a contract with France, to supply the French armies, and covered, as here, with the semblance of American character. If that case be law, there is an end of this cause. But Ch. Justice Spencer, speaking of the decision in that case, says he considers the doctrines advanced by Sir William Scott, "the result of power forgetting right, and the offspring of state policy, created for the occasion." It is unfortunate for the learned Judge, that Sir William Scott did not make the decision which he imputes to him. It happens to have been made by Earl Mansfield, Sir R. P. Arden, Master of the Rolls, and Sir W. Wynne. This, alone, is perhaps not very important; but the Chief Justice committed another mistake, in relation to that case, which is so. Far from being a peculiar doctrine of Sir William Scott, and "the result of power forgetting right," the case shows that the rule by which it was decided is an ancient one, which had been frequently acted upon. The cargo must have been considered as enemy's property upon every principle. Adopt a contrary rule, and it is impossible for belligerents to protect themselves by seizing any property which should be afloat. Very soon there would be no such thing as enemy's property. Some De Wolf will always be found to shield it with his name.

Again, says Chief Justice Spencer, "if the contract would be a legal one in time of peace, which Sir William Scott expressly admits, and if the property would be deemed the plaintiffs, until actual delivery at one of the elected ports, what would vitiate this contract, or make the property the vendee's, before the performance of the condition precedent, according to the law of nations? Certainly not because there was *war* between Spain and Venezuela." Now the true answer to the question put is, precisely, that there was a *war*. There was a right to make the contract, but it is illegal because the *war* intervened. *War*, therefore, makes

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all the difference. Why would this contract have been legal in time of pence? Because it would then depend upon the municipal law of the state where it was made, or is to be performed. In the event of war, it is governed by the common law of nations. These principles do not rest on British authority alone. They have been followed up in this country. In time of war another party is raised up. It is no longer a mere question of *meum* and *tuum*, between two individual citizens. It is a settled principle of national law, that property so shipped by a neutral as to impose upon a belligerent, is itself a cause of condemnation. A neutral has his rights, but he also has his duties. He has no right to protect belligerent property. It is lawful for one enemy to deceive another. In that case fraud is legal, and perhaps moral; but it is otherwise with a neutral. He ought to act in good faith towards both belligerents. "I wish neutrals," says Sir William Scott, (j) "to understand, that if they mean to avail themselves of the rights of neutrals, they must conduct themselves as such. It will then be the duty of this Court, and the ambition of it, to exert its utmost vigilance to give them the benefit of their neutrality. But, on the other side, if they discredit their case, by a clothing of prevarication and falsehood, who is to blame for the inconveniency that may ensue?" In this case the answer is easy. De Wolf has covered this property, and ought to be visited with the legal consequences of such an act. "By the modern law of nations," says Justice Story, (k) "provisions are not, in general, deemed contraband; but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination. If destined for the ordinary use of life in an enemy's country, they are not, in general, contraband; but it is otherwise, if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband." This is going even farther than we wish to go in the present case. If this cargo was contraband, it was prize of war. It was not American property, within the meaning of the warranty. The same Judge, in the case of *The Ann Green*, (l) says, "The

(j) In *The Rosalie & Betty*, 2 Rob. Adm. Rep. 359.

(k) In *The Commercen*, 1 Wheat. Rep. 387.

(l) 1 Gall. Rep. 291.

cases are, as I think, settled upon just principles, that decide that, in time of war, property shall not be permitted to change character in its transit; nor shall property consigned, to become the property of the enemy on arrival, be protected by the neutrality of the shipper. Such contracts, however valid in time of peace, are considered, if made in war, or in contemplation of war, as infringements of belligerents' rights, and calculated to introduce the grossest frauds. In fact, if they could prevail, not a single bale of enemy's goods would ever be found upon the ocean." If a cargo of ordinary merchandize, thus shipped, (a mere cargo of dry goods; for instance,) would be deemed contraband, the reasons are ten-fold strong in support of the case which we present. This is not the doctrine of "power forgetting right," as was supposed by his honor Judge Spencer. It has always been, and always must be the doctrine of Courts of Admiralty.

This contract was made with a view to the law of nations. Upon questions of national law, common to all, it is your duty to follow the decisions of our national Court, the Supreme Court of the United States. If you decide in the face of the law of nations, you may involve the country in war. To avoid this hazard, the constitution has given cognizance of questions involving the peace of the nation to our Courts of Admiralty.

Chief Justice Spencer supposes that the question of property is settled by the case of *Ludlow v. Bowne & Eddy*, (m) That was a decision by the Supreme Court on a case, leaving to the parties no powers of appeal. The decision was by a divided Court, and Livingston, Justice, gave no opinion. Judgment was given for the plaintiff, by a bare majority. But had the judgment been unanimous, it would not be binding on this high tribunal, though I admit that it should be respected as the decision of learned Judges. At that time the cases cited from Wheaton and Gallison had not been decided. Had the Supreme Court been in possession of these authorities, they would doubtless have decided otherwise. This case is distinguishable from that of *Ludlow v. Bowne & Eddy*. In that case the cargo was not

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(m) 1 John
Rep. 1.

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(n) 2 Caines'
Cas. Err. 217.
2 John. Cas.
451, S. C.

o) Croud-
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Cranch, 434.

shipped under a contract with a belligerent. There were in that case no letters or documents giving a false history of, and a false color to the transaction. It was a case of mere commercial adventure, not intended, as here, to supply the army or navy of the belligerent.

But whether this cargo was or was not American property, the condemnation is conclusive evidence against De Wolf. I am aware that in *Vandenheuvel v. The United Insurance Company*, (n) this Court decided that condemnation by a foreign Court of Admiralty, is only, *prima facie*, evidence as to the character of the property; but it has been so often decided otherwise, since that time, that I feel myself warranted in calling upon this Court to reconsider their former decision. The Supreme Court of the United States have passed upon the question. (o)

SANFORD, Chancellor. Mr. President, I submit whether this question should be discussed. It is as perfectly settled by the case alluded to, as any question can be in this Court. The point decided in *Vandenheuvel v. The United Insurance Company*, was, that the sentence of a foreign Court of Admiralty is not conclusive on the character of the property, in an action on a policy of insurance. I am satisfied that the decision is correct. But if I thought otherwise, I should feel myself bound to say, that a question at rest, as this has been for 20 years, should not be opened. At this rate nothing is settled. Our citizens have regulated their conduct by the rule established in that case. Important rights have arisen under that rule. Ought they, at this day, to be drawn in question? Finding by one of the printed points in this case, that the sentence of condemnation was to be relied upon as conclusive, I had prepared a written resolution upon this subject, which is, that the President be requested to instruct the counsel not to argue this point.

STRANAHAN & CRAMER, Senators, concurred.

SUDAM, Senator. The resolution proposed by his honor the Chancellor is a surprise upon me. I was not aware that the point to which it relates would be made by counsel. The

decision in *Vandenheuvel v. The United Insurance Company*, has been acquiesced in for a great number of years, and our decision against that case would unsettle the law: but I am not prepared, at this moment, to say that the Court ought not to hear the argument. I know that this is a vexed question, and I should never be inclined to overrule a former decision of this Court upon slight grounds.

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WHEELER, Senator. As a plain and unpractised man, I confess the proposition to interrupt the argument upon this question struck me with some surprise. I had been taught that even Courts of justice may err, and that they will review their decisions when satisfied that they are wrong. I understand it is proposed to show that the Supreme Court of the United States have passed upon the question, and overruled the former decision of this Court. The decision of that high tribunal should be looked to by this Court with very great deference. Is it not possible that the decision in *Vandenheuvel v. The United Insurance Company* may have been a mistaken one? and ought we, at all events, to withhold a reconsideration.

CLARK & EARLL, Senators, concurred with the Chancellor.

REDFIELD, Senator. I was not aware that this question would arise. My recollection of the case proposed by the counsel to be overthrown, is very imperfect; nor have I examined the other authorities alluded to, in relation to the question. One of them is said to be a decision by the Supreme Court of the United States. Now suppose an act of Congress had passed, determining the effect of these foreign sentences of condemnation, every Court in the Union would be bound to acquiesce. I am not prepared to say that we ought not to listen to a decision of the Supreme Court of the United States, upon this commercial question, involving a point of national law, with almost the same degree of deference as to an act of Congress.

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SUDAM, Senator, moved to adjourn. He said that the interval of adjournment would afford time for consideration, and probably lead to a concurrence with his honor the Chancellor, and save a long argument upon a point which, perhaps, should not be argued. He felt that his honor the Chancellor's long experience in public business, and extensive acquaintance with commercial law, entitled his opinion, upon this question, to peculiar weight, but he would prefer looking into the cases before he pronounced one way or the other upon the resolution submitted.

Ogden. With leave, I will proceed upon another point, till the hour of adjournment shall arrive.

SUDAM, Senator, withdrew his motion, and the counsel proceeded.

If the question of property is to be decided by the strict and narrow principles of the common law, the cargo, on its shipment, became the property of Levy. If not, it became so at Havana, or on its capture. I have already shown that little reliance can be placed on the letters and documents of De Wolf. *Falsus in uno, falsus in omnibus.* What was the object? To defraud the government of Venezuela; or, failing in this, to impose upon the insurers. I make this remark in reference to the letters of the 21st of July, which were doubtless written with an eye to the safety of this very property. The negotiation was pending some days, during which the whole scheme was probably settled. The parties saw that their plan might yet be defeated, if the property should be captured, and to secure themselves against all events, they next resort to the expedient of an insurance. The plaintiffs in error insured upon a warranty for a small premium. The letters were probably written by concert between De Wolf and Levy. The policy bears the same date with the letters; yet the cargo was not shipped till the 4th of August, leaving the letters to remain in New York. These letters amount, in fair construction, to a sale of the

cargo, accompanied with an agreement, on the part of the vendor, in consideration of the one dollar freight, to carry it to Havana. When was the consideration to be paid? The time of payment, in contracts of this nature, when the payment is to be made in future, is almost as material as the payment itself. It is always so to a merchant. It is unaccountable that a future payment, of this importance, should have been left altogether indefinite as to time. There being nothing in the contract to show the time, we have a right to infer, from the nature of doing business, that the payment was made beforehand. De Wolf, by the letter of the 3d of August, requested Hernandez & Chavatau to furnish money for the disbursements of Capt. Pratt, taking his bill on De Wolf for reimbursement. This was to be in case the brig discharged at Havana. It is plain, therefore, that no money was to have been paid at Havana. If paid there, the reimbursement would most naturally have been out of the moneys paid. Even these ordinary disbursements were provided for in New York, where the contract was made, furnishing an additional presumption that the money was paid there. If not, when was it paid? Did De Wolf receive notes? Why not produce them? He was a merchant understanding his business; and we are to presume that the money was paid, which superseded all further provision for payment. Is it possible that it would not have been noticed in the agreement, if to be paid for after notice of delivery at Havana? The case of *Ludlow v. Bowne & Eddy*, had already been decided, and it was under the authority of this case that the contract was made. It is plain that De Wolf was a mere agent. Levy was the one solely interested. He purchased the cargo at 5 per cent. advance. His funds paid for it. He was to pay the freight stipulated, and the premium of insurance. The whole was at his risk; and this insurance was not upon American but Danish property.

But suppose the cargo was not purchased by Levy at New York. Suppose it a contract to send De Wolf's property to Levy. On the delivery of the property it would become Levy's. The cargo is shipped with a bill of lading, and

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no freight was to be charged at Havana. The delivery on board the vessel, of the cargo consigned to Hernandez & Chavitau, was a delivery to Levy himself. They were pointed out to him as the consignees—they were possessed of his instructions. A delivery on board the vessel, with a bill of lading, is a delivery to the consignee, for all purposes except that of stoppage *in transitu*. Viewing this as the common case between vendor and vendee, then, the cargo was Levy's before it left the port of New York. What is meant by the delivery of property? Placing it under the control and direction of the vendee. As an illustration, take a familiar case. The vendor delivers the key of his warehouse, containing the goods sold. This is a delivery of the goods. The books are full of such cases. Who had the control of the vessel at New York? De Wolf had parted with all his control, and given orders to deliver the cargo to Hernandez & Chavitau.

[Here the Court adjourned for the day. On re-assembling the next morning,]

SUDAM, Senator. I have looked into the case of *Vandenhoevel v. the United Insurance Company*. I find that in the Supreme Court three of the justices give an opinion—one had not heard the argument, and one was absent. In this Court the decision of the Supreme Court was unanimously reversed, with the exception of Van Vechten, Senator. A note to this case gives the decisions of other Courts upon the same question. I have also looked into the case of *Croudson v. Leonard*,^(p) in which a majority of the Supreme Court of the United States held the sentence of condemnation conclusive, and examined other cases which were cited and relied upon in support of that decision; and I must say that I now concur most cheerfully with his honor the Chancellor, in thinking that we ought not to allow the question to be argued. It would be inexpedient and unwise, even to hear it discussed. It has been settled, and has not been stirred, in any case, since 1802.

(p) 4 Cranch,
434.

THE COURT unanimously concurred with the Chancellor, and the argument for the plaintiff in error was resumed.

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Ogden. But if the property did not pass, at New York, it became complete in Hernandez & Chavitau, at Havana. On arriving at Havana, their clerk altered the bill of lading, and altered the destination of the vessel. They thus exercised the entire control and direction of the brig. Were they the agents of De Wolf? No. I have already shown that they were the agents of Levy.

But suppose the delivery incomplete at Havana. We then contend that the capture by the cruisers of Venezuela was equivalent to a delivery to Levy. The captors succeeded to all his rights—to all the rights which he would have had in the property, if it had been actually delivered to him at Havana. This is the doctrine of *The Packet de Bilbao*,^(q) which is also a strong case to show that the cargo was enemy's property under the first point. Sir William Scott says, "In time of war, these executory contracts cannot be permitted; for they would, at once, put an end to all captures at sea. The risk would, in all cases, be laid on the consignor, where it suited the purpose of protection. On every contemplation of war, this contrivance would be practised in all consignments from neutral ports to the enemy's country, to the manifest defrauding of all rights of capture. It is, therefore, considered to be an invalid contract in time of war; or, to express it more accurately, it is a contract which, if made in war, has this effect—that the captor has a right to seize it, and convert the property to his own use; for he having all the rights that belonged to his enemy, is authorized to have his taking possession considered as equivalent to an actual delivery to his enemy." De Wolf must be bound by the law of nations. *Ludlow v. Bowne & Eddy*, is not decisive of this point, as was supposed by the Court below. There the cargo was, in terms, to be paid for after its arrival in France, by a bill to be endorsed by a particular house in France. Ludlow had a right to hold the property as his own till the endorsement should have been made. The delivery was truly a condition precedent. And the

(q) 2 Rob.
Adm. . Rep.
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opinions of the Justices turn on this point. There is nothing in this case which resembles that in these particulars.

But suppose this to have been American property. There was a fraudulent concealment from the insurers of circumstances material to the risk. "Every fact and circumstance which can possibly influence the mind of any prudent and intelligent insurer, in determining whether he will underwrite the policy at all, or at what premium he will underwrite it, is material. Therefore, whatever the insured knows respecting the state of the ship, the nature of the employ in which she is to be engaged, the time of her sailing, the time of her expected arrival, &c., ought to be fully and explicitly disclosed; and the keeping back any fact of this sort, will be fatal to the contract;"^(r) "In such case," says Marshall,^(s) "the concealment so vitiates the policy, that it will afford the insured no remedy, even from a loss arising from a cause unconnected with the fact or circumstance concealed; for a concealment is to be considered, not with reference to the *event*, but to its effect at the time of making the contract."

(r) Mar-
shall on Ins.
467.
(s) Id.

(t) Holt's N.
P. Rep. 283,
& 287, note.

Has the communication, required by this authority, been made in the present case? *Durell et al. v. Bederly*,^(t) contains the same principles which I have quoted from Marshall. Would the plaintiffs in error have underwritten, had they known that the cargo was destined for the Spanish army through the hands of this Dane? Would they have lent themselves to the purpose of this fraud upon Venezuela? Or, if willing to do this, would they have undertaken for the same premium? If you believe they would not, a disclosure of the fact was material, and the policy is void. But says the Chief Justice, "a party need not communicate anything with respect to a fact, in regard to which there is an express or implied warranty." It follows from this reasoning, that the opposite is the case with regard to a material fact concerning which there is no warranty. Now the warranty is merely that the cargo was American. Conceding for the sake of the argument, that it was American, the nature of the employment in which the vessel was to be engaged should also have been commu-

allocated.^(u) There is certainly no warranty as to this ; and according to the Chief Justice's own reasoning, the policy would therefore be void. The books are full of cases showing that what is warranted against, need not be communicated. These are principally cases of unseaworthiness. But ours is a different case. The risk was materially varied by the object. In *Carter v. Boehm*,^(v) Lord Mansfield says, "the reason of the rule which obliges parties to disclose, is to prevent fraud, and to encourage good faith. It is adapted to such facts as vary the nature of the contract ; which one privately knows, and the other is ignorant of, and has no reason to suspect. The question therefore must always be, whether there was, under all the circumstances at the time the policy was underwritten, a fair representation ; or a concealment ; fraudulent if designed ; or though not designed, varying materially the object of the policy, and changing the risk understood to be run." According to the authorities, De Wolf should have communicated to the underwriters, not only his actual knowledge, but his information and belief in relation to material circumstances.

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(u) Marsh.
on Ins. 467.

(v) 3 Burr
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J. O. Hoffman, contra. The defendant in error relies on the following points :

I. The cargo insured was, at the time of its shipment and insurance, and also of its loss, the property of De Wolf, and was not to become the property of Levy, until its delivery at Havana, or a port to windward.

II. The cargo never was delivered at Havana, or at Lagaira, or Porto Cavello, being ports to windward, but was captured and thereby wholly lost on its passage to Lagaira, the vessel having first touched at Havana.

III. By the tenor of the policy, the cargo was insured "at and from New York to Havana, and at and from thence to Lagaira and Porto Cavello, or either of them." The vessel having a right, then, to stop at Havana, and proceed thence with the cargo to both, or either of the other ports, and having proceeded from Havana, for that purpose, with the cargo, the voyage insured could not, and did not terminate at that place.

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IV. The cargo insured was American property at the time of its shipment, insurance and loss. The warranty, therefore, on the subject of the policy, was complied with according to its true intent and meaning.

V. There was no concealment on the part of De Wolf, the assured, that can vitiate his insurance; nor was he bound to disclose to the underwriters the contract with Levy, the letter of instructions to the master, and letters to Hernandez & Chavitau, or either of them, because his warranty made all representations in these respects unnecessary.

VI. There is nothing to impeach the good faith of the contract between De Wolf and Levy, or to show that the cargo insured was belligerent property, and covered as such by the assured; on the contrary, the contract was perfectly lawful, and in every respect consistent with the warranty in the policy.

Many of the arguments on the other side may be answered at once, by adverting to the nature of the contract of insurance, the necessity of preliminary proofs, and the variety of evidence submitted to the jury, upon which they were addressed at the Circuit. No special verdict was taken, but the case comes here on a bill of exceptions, to the points presented in which, the parties must be confined. It will be intended, that every question of fact was settled by the jury: and the questions of law must be taken upon the points alone, which were made in the Court below. The matters given in evidence by the defendant, were insisted upon by him as a conclusive bar to the action of the plaintiff; and he called upon the Judge to take it from the jury, and pronounce upon the facts himself. This he declined doing; submitted the whole to the jury; and the single question is, whether he erred in this particular.

But if I am wrong in supposing that the facts ought not to be considered here, how do they stand? The very object of neutrality is a free and open trade; such a trade as enriched this country during the war between England and France. It is extravagant, to call it nefarious, or in the least improper to supply belligerents with provisions. Venezuela enjoys no higher rights than any other belligerent,

merely because she is struggling against Spain. Would it be illegal to send provisions to Cadiz, because it is besieged by France? It is always lawful to supply belligerents, so long as the supply is mere matter of trade. The conduct of this trade is regulated by the law of nations. If in articles contraband of war, it becomes an offence cognizable before the Courts proceeding according to the course of the law of nations, and punishable by confiscation.

The contract between De Wolf and Levy, is, on its face, perfectly honorable. Is there, as pretended, any secret fraud? Levy, a Dane, wished for provisions to fulfil a contract which he had made with the Spanish Intendant; and De Wolf contracted to deliver him those provisions at Havana, Lagaira or Porto Cavello, at his own risk. Before the arrival of the brig at Havana, and afterwards on its transit to Lagaira, or Porto Cavello, the cargo belonged to De Wolf. Was it not at his risk? Suppose a case of distress, and putting into a port of necessity, and a sale of the cargo, would this have been for the use of Levy? Clearly otherwise. It would have been for the use of De Wolf. He would have been entitled to the avails. Had the cargo belonged to Levy, it would have been all along at his risk. The contract amounts to no more than that the cargo was deliverable at Havana, or some other port as Levy should direct. A greater or less proportion of freight was to be allowed, as the vessel proceeded to the one or the other of these ports. The profit was not merely the 5 per cent. on the invoice price. It was also the freight, which was an important object in a commercial adventure of this nature; and it was important that it should remain under De Wolf's control till finally delivered. There is no inconsistency in the bill of lading, with the supposition that the cargo was his property. It was impossible for him to tell what the freight would amount to, from the vessel being destined to different ports as Levy might direct. He relied upon his contract for freight. He accompanied this property by his agent during its transit with a view to his freight. An inference is attempted that the cargo was paid for in New York. The freight could not have been paid

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for there, for it was not yet earned, and it was uncertain what it would finally be. The legal inference is, that goods are to be paid for when delivered, if no other time is stipulated by the parties. The bill of exceptions declares expressly, that the goods were to be paid for on their delivery, and this appeared from the evidence of the plaintiffs in error.

It is complained that De Wolf did not ship in the name of Levy. This would have been improper. It would have been to speak a language untrue in reference to the property of this cargo, which was to remain in De Wolf; and comes back to the question, to whom did the cargo belong? Take the case of a merchant in New York, who sells goods to his customer in the western part of this state, and contracts to convey the goods at his own risk as far as Albany—Is there any doubt that the property would continue in the vendor till the goods should arrive at Albany?

With regard to the two letters directed to Hernandez & Chavitau, Levy may have had his private reasons why his name should not appear there. This is a matter with which the underwriters had no concern. Levy might not wish to be seen in the act of supplying the army or navy of Spain with provisions; as he might, at the same time, have been carrying on a profitable trade with her colonies. But it does not follow that the letters were intended as a cover on the part of De Wolf.

The boldest assertion is, that De Wolf knew the destination of the goods, and understood the object for which they were purchased. This is directly contradicted by the evidence of the plaintiffs in error; the bill of exceptions states expressly, that De Wolf *did not know the object*; and we have been entertained by an ingenious law argument to show that he ought to have communicated to the underwriters what was wholly unknown to him. The underwriters knew the destination, and could appreciate the hazard. They insured a voyage to the Spanish colonies on the face of the contract. Was not this enough to put them on inquiry? It is much more probable that the object was known to the underwriters, than to De Wolf. This also

disposes of another charge made against us : that of undue concealment.

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But we are told, that by the strict principles of the common law, the property passed to Levy, by a delivery to the captain, while the cargo was yet in New York. Wherever the property is placed at the risk of the consignees, there I admit the rule advanced on the other side ; that a delivery to the captain vests the title in the consignee. But the error of the argument consists in applying that rule to a case where the cargo remains at the risk of the vendor. In *Ludlow v. Beane & Eddy*,^(w) this distinction was very fully examined, and considered as settled by all the cases. Thompson, J. remarks, in that case,^(x) "Whatever may be the general rules of law, and the ordinary course of commerce, applicable to any given class of cases, there can be no doubt that these general rules may be varied and modified, by special agreement. (3 P. Wms. 186. *Godfrey v. Furzo*, 1 T. R. 748.) This was admitted, in its fullest extent, by Sir William Scott, in the case of the *Packet De Silboa*, (2 Rob. Rep. 133.) The vesting of property, says Lord Mansfield, may differ according to the circumstance of cases, (*Davis and another v. James*, 5 Burr. 2680.) The general rule of law is, that, as between vendor and vendee, the property is not altered till the delivery of the goods. (*Snee & others v. Prescott & others*, 1 Atk. 245. *Mason v. Lickbarrow*, 1 H. Bl. Rep. 35. *Ellis v. Hunt*, 3 T. R. 469.) A distinction is sometimes made between an actual delivery to the vendee himself, and a constructive delivery to some intermediate person. In the latter case, when the goods are at the risk of the vendee, it is equivalent to an actual delivery. (3 T. R. 469.)" The case in 1 John. was that of an absolute consignment to persons residing in France, and the consignees were parties to the contract. This case is not so strong. The consignment was to intermediate persons, Hernandez & Chavitau, for the very purpose of keeping the control of the cargo. The agreement is—not that we were to deliver at New York ; but to Hernandez & Chavitau, or at Lagaira or Porto Cavello. No matter what the bill of la-

(w) Vol. 1 John. Rep 17 and 18.

(x) Id. p. 9

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ing says. It is controlled and modified by the agreement. This was so held in *Ludlow v. Bowne & Eddy*.

There could have been no delivery at Havana, without an acceptance. If not accepted there, the goods were, by agreement, to pass on to another port. The very terms of the contract forbade a delivery, unless Hernandez & Chavitaу chose to accept them. The consignees had the right to receive the goods, or direct them to another port; and they exercised, under Levy, the election that the goods should proceed. Levy had a right to this election, in consideration of his agreement to advance the 5 per cent. and pay additional freight. He did not act as owner of the goods. The vessel arrived at Havana the 10th of September—never broke bulk; but on the 11th, was ordered to proceed to Porto Cavello; yet the real character of the transaction is sought to be changed by a fiction; a delivery at New York or Havana. Suppose an action for goods sold and delivered, brought by De Wolf against Levy, bottomed on a delivery at Havana: a lawyer would smile with contempt at the idea. Most plainly such an action would not lie. The endorsement on the bill of lading was necessary, in exercising the election directed by the letter. This course was the strongest proof of fairness with regard to De Wolf. The endorsement was openly made, and contained an order to proceed. The bill of lading was the very document on which the direction should have been made, under the contract. There never was a delivery of the cargo.

As to the alleged fraud, and concealment, the jury have passed upon it. I have already shown there could have been no fraudulent concealment by De Wolf; for he knew nothing. To avoid the contract, it must have been fraudulent. The premium was regulated according to the risk. To Havana, it was 1½ per cent.; but it rose to 5 per cent. as the danger increased. The underwriters understood themselves perfectly. The question of fraudulent concealment was properly a question of fact, or a mixed question of law and fact, and the jury have found against it. (y)

(y) *Haywood et al. v. Rodgers*, 4 East, 590. *Livingston v. The Maryland Insurance Company*, 6 Cranch, 274.

We now come to the real question in the cause; which is whether the warranty was violated, the cargo not being

American property. To say that it must be American property, in the largest sense of the law of nations, is too broad a proposition. The law of nations would afford no uniform rule; it is subject to alteration, by treaty. But before I proceed to examine this law, in reference to the question of property, I ask the particular attention of the Court to the case of *Ludlow v. Bourne & Eddy*, which was decided as long ago as 1806. I agree that when De Wolf and Levy made their contract, they had this very case in view, and acted in reference to it. It has been considered the law of the land ever since it was decided. There is not a feature in that case which does not tend stronger than any one in the case before us to prove collusion; and being presented in the shape of a case, the Court had a greater latitude of inference than can be taken here. The decision was not, (as supposed on the other side,) by a divided Court, so far as the question of property was concerned. Chief Justice Kent put the case on the ground of a fraudulent intention to cover belligerent property, admitting the principles on which the rest of the Court proceeded. By looking into that case, it will be seen that a *war risk* appears on the face of the contract, implying an interference with belligerent rights. It is true that bills on France were to be taken in payment, a circumstance relied upon to show that the property did not pass, because it was not paid for; but the goods of De Wolf were not to pass till delivered to the vendee. Three Judges denied that the contract was to be considered a cover, and questioned the decisions of the Courts of Admiralty as evidence of the law of nations. These Judges were governed by the language of the policy, and the real interest of the parties as understood by the municipal law. I invite the attention of the Court to the whole of that case, and if the reasoning of the Judges is not found convincing and conclusive, I am a stranger to the force of language. By adverting to the opinion of the Chief Justice, you will find that he would not commit himself upon the ground taken by the other Judges, but relied for his opinion solely upon the fraud which he supposed to have been established. Let it not be said that here was a divided Court.

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Is a neutral permitted, in contemplation of war, to agree for property, to become vested in him on its arrival in a belligerent port? Or does such a contract vest the property in the belligerent, while it is yet *in transitu*? If either of these questions are determined against us, we must fail. It must be admitted that such a contract would be valid in time of peace, and that the property would remain in the shipper during the voyage. Now I assume it as a well established proposition in the law of nations, that a contract which is allowed to a neutral in time of peace, is also allowed during war, with two exceptions only—where it interferes with the rights of blockade, or relates to articles contraband of war. I challenge gentlemen to find another exception, from Grotius down to the latest writer on the law of nations; nor is it required by policy. Are we to surrender a most valuable branch of trade, without the semblance of reason or authority? So long as we limit ourselves to the rules of international law, we are right—we are safe, and ought to be so. A contrary rule may promote the interest of certain belligerents, but it never can be for our interest, who are generally neutral. Shall we always be bound to fish out the market before venturing upon a contract? Does the previous contract depend entirely upon vigilance in eluding the enemy, and accidentally being able to land the property at the port of destination? Does that contract, whatever may be its provisions, destroy the neutral character of the property? Must everything, in relation to the commerce of neutrals, be mere hap-hazard? Beware how you adopt a doctrine so injurious to neutral rights. England and France are at war—a cargo is shipped from a merchant in England to one of our own merchants, who is to remit the proceeds, at his risk, in pot and pearl ashes; but because this is to enrich England, it may be seized and confiscated by France. She condemns the cargo because it is going to an English house. This is the length of the doctrine on the other side. It places the neutral on the same footing with the belligerent. Even where property is destined to a blockaded port, it is not, for that reason, to be condemned. You have a right to go

these. If the blockade continue, you are to be warned off, but it is illegal to seize your goods *in transitu*.

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This cargo was not contraband. Provisions are not considered so. Contraband is a term well understood by the law of nations, and consists in the munitions of war. But even if contraband, the articles are not, for that reason, always to be condemned by the law of nations. They may be seized, but if the merchant turns out to have been honest, they are to be paid for, or detained and placed beyond the reach of the enemy, and restored when the danger is over. This principle is according to our treaties with Great Britain, France, Spain, &c. But it is enough that provisions are not contraband of war. No doubt Great Britain attempted to make them so, during the late war between her and France. It is for her interest that they should be so considered. Ours is directly the contrary. *The Sally Griffiths*(*z*) is the first case of a condemnation of provisions *in transitu*; and there was a contract directly to supply the French army. Provisions were never treated as contraband by the Courts of any other country. I invite this Court to read the opinion of Chief Justice Marshall, in the case of *The Commercen*, so much relied upon on the other side. Two of the Judges agreed with him, and three concurred with Mr. Justice Story. While gentlemen talk of a divided Court, I beg leave to remind them how this Court was divided. Marshall might be placed by the side of Sir William Scott, and yet maintain the dignity of his country. *En passant*, look at the note to that case, (1 Wheat. 391,) exhibiting our treaty with Spain, in which provisions are expressly excepted from among articles contraband, as fixed by the treaty. Even Justice Story decides that provisions are not contraband, but goes on the ground of a direct destination. Ours is called enemy's property. Indeed, any and every ground is taken in the sentence of condemnation, which can give color for confiscating the cargo.

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(*z*)
Adm.
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Having argued the case of *Ludlow v. Bowne & Eddy*, I am indebted, in part, to my notes in that case for a brief history of the doctrine relied upon, as it exists in the English Courts of Admiralty. Till 1795, there was no decision

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on the subject. I had searched Marriott's Admiralty Decisions and found none there. By a note to *The Commercen*, (1 Wheat. 389, n. i,) it will be seen that the law of France does not consider provisions as contraband, except when destined to besieged and blockaded places.

Upon a question as to the law of nations, the decisions of France are as high authority with us as those of England. Even upon the common law, the English decisions since the revolution are not binding; and not one of the English decisions cited goes upon the law of nations. They merely establish a rule of evidence, and hold certain circumstances, when proved, to be conclusive as a *presumptio juris et de jure*. Upon this rule, certain contracts, like the one under consideration, are holden fraudulent, and made for the purpose of covering the property of an enemy. This is the whole extent of the doctrine, as maintained in England.

(a) 1 Rob.
Adm. Rep.
338.

The *Vrouw Margaretha*, (a) is the first reported case in which it was advanced. The Court there say, (speaking of it as a rule of evidence,) "When war intervenes, another rule is set up in Courts of Admiralty, which interferes with the ordinary practice. In a state of war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of the shipment, till the actual delivery. This arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy. If such a rule did not exist, all goods shipped in the enemy's country would be protected by transfers which it would be impossible to detect. It is on that principle held, I believe, as a general rule, that property cannot be converted *in transitu*; and in that sense I recognize it as a rule of this Court." The *Packet*

(b) 2 Rob.
133.

de Bilbao, (b) is the next case. In this, Sir W. Scott said, that a contract of sale to an enemy, though made by a neutral, with a provision that the risk should fall on the consignor till the goods came into possession of the consignee, entitled the captor to consider them as enemy's property.

(c) 3 Rob.
300, in note.
(d) Id. 299.

The *Sally Griffiths*, (c) is the next reported case. Now this was never relied upon till the case of *The Atlas*, (d) in which Scott speaks of the rule as one which belonged to the prize

Courts. *The Sally Griffiths* was in 1795, and is the first case in which the principle can be said to have been established, even in the prize Courts. In *The Anna Catharina*, (e) Scott considered the contract as in truth executory, but executed according to the decisions and rules of evidence which prevailed in the Courts of Admiralty. *The Jan Frederic* (f) was the case of a Dutch merchant, who had contracted, in contemplation of war, for the transfer of colonial property, *in transitu*, and the Court lay down the rule as established, that an actual transfer of goods, *in transitu*, to a neutral, though before the war, if in contemplation of it, is illegal. The Court say, that "in time of war this is prohibited as a vicious contract, being a fraud on belligerent rights, not only in the particular transaction, but in the great facility which it would necessarily introduce of evading those rights beyond the possibility of detection. It is a road that, in time of war, must be shut up; for although honest men might be induced to travel it with very innocent intentions, the far greater proportion of those who passed would use it only for sinister purposes, and with views of fraud on the rights of the belligerent." That is to say, because fraud may be practised, we will cut up all commerce with the enemy. The contract shall be executed, or executory, according to our purposes. It is such doctrine as this which the court, in *Ludlow v. Bowne & Eddy*, reprobate. Your contract may be profitable, executory, and made before the war; yet, if the property is shipped, it must go. If you insure it as your own, it is anothers, and you must lose your insurance. You can neither sell nor insure. You lose your right of lien. Contrary to your consent, the property is executed in the vendee; all is at his risk, as his property. It is subject to confiscation, by the rules of a British Court of Admiralty. This is an abominable doctrine, at war with the most sacred principles of international law. Between Great Britain and her colonies we cannot trade in time of peace; consequently war does not sanction such a trade. This is but another illustration of the general rule which I before laid down, that what is permitted to a neutral in time of peace is lawful in time of war.

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(e) 4 Rob
Adm. Rep
107, & vid. id
114, n. (a)
(f) 5 Rob
Adm. Rep
115.

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But we are told that the capture passes the property. This is another fancy of Sir William Scott, in direct contradiction to the law of nations. The rule of this law is explicit, that a capture works no change of property—divests no lien. At most, the captor takes the interest of the enemy, subject to all the rights of the neutral.

(g) 1 Gall.
275.

But we are told that the ship *Ann Green* (g) sanctions the doctrine of Sir William Scott. There is in that case, I admit, a dictum of Mr. Justice Story, in which he speaks of the doctrine in *The Sally Griffiths*, and the class of cases to which it belongs, in the language quoted by the other side. But there is a class of cases in the Supreme Court of the United States, which puts the question at rest. They are

(h) 334 to
340, tit. Prize.

collected in Wheaton's Digest. (h) They declare that if the property remain at the risk of the consignor, it is to be deemed his, though otherwise, if at the risk of the consignee. At whose risk, while *in transitu*? is the true question. This is placed, by those cases, on the broad basis of national law.

(i) 8 Cranch.
253, 275.

What the Court say in *The Venus*, (i) is full to this point. Their language is that, "to effect a change of the property as between seller and buyer, it is essential that there should be a contract of sale agreed to by the parties; and if the thing agreed to be sold, is to be sent by the vendor to the vendee, it is necessary to the perfection of the contract, that it should be delivered to the purchaser or his agent." *The*

(j) id. 317,
335 and 359.

(k) 1 Wheat.
208, & id. 25.

Merrimack & Frances, (j) *The St. Jose Indiano* and *The Mary & Susan*, (k) are to the same effect. All these are cases of capture during the transit. So long as the neutral consignor runs any risk whatever, the property is deemed safe. It is not until he has parted with all his control to the enemy, that it puts on the belligerent character. Suppose that in this case there had been no capture and no condemnation, but a loss by perils of the sea—the defence would have been as complete in such an event as it is now; and yet, would there have been any doubt of our right to recover? No. We should then have been perplexed by none of these nice refinements upon international or municipal law. I trust this Court will never look to the English Courts of Admiralty for rules of evidence under the law of nations.

But conceding, for the sake of the argument, that the law of nations is otherwise than what we had supposed—that the decisions of the British Courts of Admiralty form the law of this state—these must yield to the conventional law. What is the Spanish treaty with this country? It will be found in Wheaton's Digest.^(l) I allude to the Spanish treaty of 1795. The principle there recognized is, that free ships make free goods. Shall Venezuela be allowed to annul this treaty? She was not an independent nation at the period of the adventure. She cannot be considered so by us, until her independence was acknowledged by our government, which was not till after the capture.^(m) But whether independent or not, how far had she a right to do away our treaty with the mother country? When this treaty was made, she was an integral part of the Spanish empire, and as such bound by the transaction. She was a party to the bargain. In *Gelston v. Hoyt*,⁽ⁿ⁾ Ch. J. Marshall says, "No doctrine is better established, that than it belongs exclusively to governments to recognize new states in the revolutions which may occur in the world, and until such recognition, either by our own government or the government to which the new state belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered." The question, how far a colony should be considered independent before acknowledged to be so by our government, was directly involved in the determination of that cause. In *Rose v. Himely*,^(o) he says, "It is for governments to decide, whether they will consider St. Domingo as an independent nation; and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony as still subsisting." This point alone is decisive of the cause.

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(l) 340, and
vid. 2 Wheat.
Rep. 227, 246.

(m) *Gelston*
v. *Hoyt*, 13
John. 361.

(n) 3 Wheat.
Rep. 324.

(o) 4 Cranch,
272.

T. A. Emmet, (same side.) This Court have no right, on a writ of error, to examine questions of jury investigation. They ought not to forget that the points in this cause arise upon a bill of exceptions, the object of which is to reverse the judgment on matters of law. Is there any case, on a

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writ of error, in which questions of fact can be decided ! Every thing of that nature must be previously settled, in order to present the dry question of law. This should be by a jury, or a case made by consent, subject to the opinion of the Court below. Such a case, though made without the intervention of a jury, being subject to the opinion of the Court, and passed upon by them, would be equivalent to, and might be turned into a special verdict by the consent of parties. Why did not the plaintiffs in error try the cause in the Court below before a jury ? Because they did not mean to insist on a state of facts differing from that which is stated in the bill. The case was turned into a bill of exceptions. This is the same in effect as a special verdict. A writ of error, on matter of law arising from the evidence, generally comes here either upon a special verdict, finding the facts, or a bill of exceptions upon which the facts are conceded.

This writ of error is duly brought on exception to the Judge's opinion upon a question of law. It finds fault, that he left all matters to the jury, and did not hold them conclusive. And whether this was right is the single point in the cause. Under the Judge's charge, gentlemen had a right to go to the jury upon the question of fraud, or any other question of fact, and ask the Judge to charge upon the points which they had made. They did not do so. What are the matters stated in the bill ? If there were contradictory facts, the jury must have found one way or the other. But in a bill of exceptions, the parties under the direction of the Court, must agree upon conclusions of fact, and they cannot afterwards be questioned.

According to the statement of the bill, we proved the property and loss, and stopped there. We rested upon these circumstances. The other side required no more. They put us upon no other proof. They then take up the cause, go on and make out our case as to property, risk and delivery, and cannot now question it in either of these particulars. They then prove the contract, and our ignorance of the contract made by Levy with the Intendant—that De Wolf purchased the cargo with his own funds ; and yet they complain that we did not prove all this. Upon what ground can

they say that the vessel was laden with Levy's funds?—that De Wolf knew that the cargo was destined for the Spanish Intendant? and that he delivered the goods to Levy in New York? &c.

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In this view of the case, the only question for this Court to determine is, whether the facts stated in the bill were conclusive against us? Were they a bar to the action? To decide this is the proper function of the Court.

But examine the facts for a moment. The bill of lading is true. It speaks of the property as belonging to the owners of the vessel. The invoice declares it to be for the account and risk of the shipper. The letters speak of De Wolf's interest—"If for my interest, pass on the vessel to windward." The bill of lading and invoice are strictly true; and that cannot be called fraud, in relation to which the party is not obliged to speak. Neither in peace nor in war is a merchant bound to make any disclosure that will not affect the national character which he assumes. In peace he is not bound to lay open his mercantile transactions to the world; nor can a belligerent claim this.

The national character of De Wolf is fully established; but he did not ship in Levy's name, because by doing so he would have parted with the right of property, surrendered the control of the cargo, and could not have held it to secure the payment of the price; and there may be a variety of reasons entirely disconnected with peace or war, why the property should not be immediately delivered. He might have dreaded attachments against the cargo, as the property of Levy, at New York, Havana, or any other port into which the ship might have been driven.

That he should communicate the fact that the cargo was designed for the Spanish Intendant, was impossible, because he did not know it. It is said he might have heard so, though he did not know it, and should have communicated his information. But the proof that he did not know it comes from the other side. If construction is resorted to, it should be against the plaintiffs in error; and, as between knowledge and belief, it should be made to say he had no belief. What

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(p) 2 Rob.
Adm. Rep.
343.

motive, then, had he for concealment? And without knowledge or belief there could not possibly be fraud.

The only imposition of which belligerents can complain, is the concealment of national character; and in *The Rosalie & Betty*, (p) this is the exact ground on which the Court proceeded. De Wolf, being ignorant of the destination of the property, could not, therefore, be intentionally aiding the King of Spain. Nor is the destination of the cargo, for a military purpose, mentioned in the bill of exceptions. Even this important fact is left to be made out by mere inference. The bill does not state that the Intendant was to have bought the cargo either for the army or the citizens.

(q) 1 Wheat.
Rep. 382.

But I deny that provisions are contraband, because they are sent to supply the army or navy of a belligerent. The case of *The Commercen*, (q) lays down the distinction truly.

(r) id. 387, 8.

A neutral has a right to export the provisions of his own country. If he carries goods bought of an enemy's country, it is otherwise. Story, J. says, (r) that when they are the property of a neutral, they may become contraband, on account of the particular situation of the war, or on account of their destination. But this is where they do not grow in the country of the neutral; for he says again, (p. 388,) "Another exception from being treated as contraband is, where the provisions are the growth of the neutral exporting country. But if they be the growth of an enemy's country, and more especially, if the property of his subjects, and destined for enemy's use, there does not seem any good reason for the exemption." He goes upon the idea that the cargo was the produce of the enemy's country. As to the produce of our own soil, nothing short of blockade or siege will prevent its transportation to any part of the world.

What the law of England is, cannot be material. We were dealing with a Spanish colony. The note referred to in Wheaton shows the Spanish treaty, and Valin's doctrine. The treaty is material. It was made in 1795, when Venezuela was a part of Spain. The colony may be separated, but what law does she carry with her? The laws of the mother country, unless altered by the competent authority

which is the contracting parties. Such alteration cannot legally take effect, till notice of it is given to those concerned. Venezuela carried with her the old treaty, which continues till altered or dissolved. In *The Nereide*,^(s) this doctrine was contended for, and would doubtless have been held, had not the cause turned on the point that the clause in the Spanish treaty was mutual. Until our government acknowledged Venezuela as an independent Republic, and they have broken off the treaty, it continues to apply. What is that treaty? It is important to inquire, because whether contraband or not, when it is made the subject of treaty, ceases to be determinable by the law of nations. By the 16th article^(t) provisions are not declared, in terms, to be contraband of war. The only exception in the treaty is a saving of the rights of siege and blockade. The law of nations, then, does not apply. It is said, on the other side, that a trade in provisions is to be restrained, rather than one in dry goods. This is a most pernicious doctrine, especially for the northern states, which abound with provisions for sale. It is contracting the market for our staple productions.

Suppose the cargo to have been contraband. What has this to do with the question? Does it interfere with the warranty that the cargo was American property? May not contraband be American property? The underwriters knew, as well as we, that it was destined to an enemy's port. But it is plain that the warranty must be construed in reference to the Spanish treaty. Conformable to that treaty it was entitled to protection, and the capture was a violation of the treaty. We were bound to know nothing except what was essential to the truth of the warranty. Being ignorant of the destination, this could never affect our right. It is said, here was enough to put us on inquiry, which was equivalent to actual notice. But this doctrine applies only as between two persons, where the vested rights of one are to be overreached. Here was no obligation to inquire. Levy had a right to his commercial secrets and was not bound to make any disclosures.

(s) 9 Cranch, 388.

(t) 2 Wheat. Rep. 233, translated there from the Spanish.

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The bargain was not contrary to the law of nations; and the rule, as laid down by the Courts of English Admiralty, does not reach it. There the property, on landing, must belong to the enemy, or it will not be deemed enemy's property while *in transitu*. Here the cargo was to belong directly to a neutral. The English rule is always laid down with a qualification in favor of this case. Besides, the rule itself has no foundation in the law of nations, and is not justified by any thing in this country, except the *obiter dictum* of Mr. Justice Story, at the beginning of the war. I mean nothing disrespectful to Judge Story, but he has studied admiralty law under Sir William Scott, and will find it necessary to change his doctrine, should the country remain neutral. But the rule, at most, is merely a rule of evidence in the prize Courts—a *presumptio juris et de jure* as it is called in *Ludlow v. Bowne & Eddy*. In the two admiralty causes which were first cited, (*The Atlas* and *Sally Griffiths*,) the decision may have been right, because they were both cases of fraud. The property was to become that of the French government. The doctrine is called a rule of the prize Courts. The Court said, "It has always been the rule of the prize Courts, that property going to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken *in transitu*, is to be considered as enemy's property." As to the *Atlas*, the cargo was bargained and sold to the French government, and was to have been delivered at the risk of the captain; and might, for that reason, have well been considered a case of collusion. These cases, then, establish merely that where enemy's property is sought to be covered by neutral names, it is a fraud upon belligerent rights, and the property may be condemned. But not one of them applies to a case where the property, as here, was to become that of a neutral.

A collusive sale to an enemy, is punished by the law of nations, because the property vests in a belligerent; but the rule itself presupposes, that neutrals are to be protected by the law of nations. They are the peculiar objects of protection by that law, and when there is a doubt whether

neutral or belligerent rights are to prevail, the presumption is in favor of the former. This is for the peace, and consequently, for the general good of mankind. The only exceptions are blockade, siege or contraband. With these exceptions, a neutral may pursue the same trade in war as in peace. England says this, though she has not gone upon presumption in favor of neutral rights. We all remember her rule of 1756, (1 Wheat. Rep. app. 507,) which shut out all intercourse during war, which was forbidden in time of peace. But you are asked to reverse the rule, and go beyond England in severity: to deny that trade in war which was fully open in peace. The reasons given for this, are two: 1. That a contrary rule will put an end to capture; and, in the language of Mr. J. Story, (1 Gall. 291,) "not a single bale of enemy's goods would ever be found upon the ocean." I see no great evil in this. It is diminishing the calamities of war; and the opposite argument interferes directly with neutral rights: 2. Decisions are relied on, that the capturing belligerent, may substitute himself for the belligerent proprietor. There are cases of this kind. They are spoken of in the *Packet De Bilbao*.^(u) Sir William Scott, speaking of property shipped in time of war, at the risk of the neutral shipper, at first calls the contract *invalid*; but afterwards he retracts and says, "It is rather a contract, which if made in war, has this effect; that the captor has a right to seize it and convert the property to his own use; for he having all the rights that belong to his enemy, is authorized to have his taking possession considered as equivalent to an actual delivery to his enemy." The conclusion, then, is, that the contract is valid; but the captor may be substituted for the vendee. Taking this reasoning in its greatest force, the captor can acquire no greater property than the vendee, who has none till delivery. The premises of the Judge do not bear out the conclusion. The captor may have all the rights of his enemy, without a delivery. This is like the case of capturing enemy's property on freight in a neutral vessel. There it is just, except in the single case, where free ships make free goods, as they do by the Spanish treaty.^(v) Coming in thus, the captor took *cum onere*; and

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133.^(v) 2 Wheat
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must pay on capture, as Levy was bound to do on delivery. When the commerce is lawful, how can the captor defeat any part of the contract?

In *Ludlow v. Bowne & Eddy*, the Supreme Court do more than to repudiate the law of the English Admiralty. They give full effect to the condition precedent, although the property was to go directly to the enemy. In this case as we have already remarked, the property was bargained to a neutral. As far as De Wolf knew, Levy had a right to make a contract of sale in any of the enemy's ports. The difference of opinion in *Ludlow v. Bowne & Eddy*, arose upon the question whether the contract was not intended as a mere cover to the property, which might well admit of doubt. Here is no room for such a doubt.

It is said that the cargo vested in Levy at New York or Havana. This goes directly to the question of interest in De Wolf. It has never before been urged in this light, or treated as an objection to the interest of the assured, and cannot be used as such here. The reason given why the cargo vested in Levy at New York, is the fanciful one that a delivery to the captain is a delivery to the consignee. But this is true of a general ship only, where the captain is considered an agent of the consignees. In this case he was De Wolf's agent. Every consignment is open to explanation by the conduct of the parties; and was so treated by Thompson J. in *Ludlow v. Bowne & Eddy*. The law of nations on this subject, is the same as the municipal law.

(w) 1 Wheat.
Cranch, 253.
(x) Id. 275.

⁸ In *The Venus*, (w) Washington, J. says, (x) "The delivery of the goods to the master of the vessel was not for the use of Magee & Jones, any more than it was for the use of the shipper solely; and consequently it amounted to nothing so as to divest the property out of the shipper;" and in *The Frances* (y) he says, "when goods are sent upon the account and risk of the shipper, the delivery to the master, is a delivery to him as agent of the shipper, not of the consignee."

(y) Id. 418.

(a) 1 Wheat.
Rep. 208.
(b) Id. 212,
113.

In *The St. Jose Indiano*, (a) Story, J. lays down the same doctrine. He says, (b) that "in general the rules of the prize Court as to the vesting of property, are the same with those of the common law, by which the thing sold, after the com-

pletion of the contract, is properly at the risk of the purchaser. But the question still recurs ; when is the contract executed ? It is certainly competent for an agent abroad, who purchases in pursuance of orders, to vest the property in his principal immediately on the purchase. This is the case when he purchases exclusively on the credit of his principal, or makes an absolute appropriation and designation of the property for his principal. But where a merchant abroad, in pursuance of orders, either sells his own goods, or purchases goods on his own credit, (and thereby, in reality, becomes the owner,) no property in the goods vests in his correspondent until he has done some notorious act to divest himself of his title, or has parted with the possession by an actual and unconditional delivery for the use of such correspondent. Until that time, he has, in legal contemplation, the exclusive property as well as possession ; and it is not a wrongful act in him to convert them to any use which he pleases. He is at liberty to contract upon any new engagements, or substitute any new conditions in relation to the shipments." These authorities go to prevent a divestment in case of a general shipper. They show conclusively, that the property does not pass from the shipper till some notorious act of delivery.

There was no delivery at Havana. It is true that a symbolical is equal to an actual delivery ; but to make it symbolical, there must be an intention to change the property. Any act done by Hernandez & Chavitau, at Havana, unless intended to operate as a delivery, cannot be considered so. What they did was rather a refusal to accept. The endorsement on the bill of lading is plain evidence of such a refusal. The brig was ordered to proceed under a right reserved in the contract. Hernandez & Chavitau did not obtain the entire control of the vessel. Could they, for instance, have ordered her to any other port than Lagaira or Porto Cavello ? They were the agents of Levy, for the purpose of ordering the property to proceed ; and, from necessity, the agents of De Wolf for changing the papers so as to give it safety. If not agents, they did a wrongful act

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when they interfered with the cargo. Could such an act divest De Wolf of his property? At whose risk would it have been, had the vessel been lost by perils of the sea between Havana and Lagaira? Could De Wolf have maintained an action against Levy for goods sold and delivered? If not, the cargo was De Wolf's during its transit.

Another ground taken on the other side, shows the great difficulty which exists with the gentlemen themselves, in determining when or where any delivery took place. They, at last, press to their aid the fanciful idea of Sir William Scott, that the capture was a delivery. Now, if this was so, the loss was *eo instanti* with the change. The property continued in De Wolf the whole time, up to the moment of the capture; and the warranty is satisfied.

But we are told that the risk was increased by circumstances which were not disclosed. Is not this a point which should have been passed upon by the jury? They have not been asked to do this; and no such fact is admitted by the bill of exceptions. What evidence is there to justify such an inference? To defeat a policy, the alleged concealment must be fraudulent.(c) But there is, in truth, no evidence either of concealment or fraud. Nor is it true, that every thing increasing the risk should be communicated. If covered by a warranty, it need not be disclosed.(d) In Park, 229, (301 of 6th ed.) it is said "there should be a representation of every thing relating to the risk which the underwriter has to run, except it be covered by a warranty." *Haywood et al. v. Rogers*,(e) was a case where the assured of a ship had received a letter from his captain, informing him that he had been obliged to have a survey on the ship at Trinidad *on account of her bad character*. But the survey which accompanied the letter, gave the ship a good character; and though it appeared in evidence, that such circumstance, if known, would have enhanced the premium, yet the Court held a communication of this unnecessary, because it was covered by the implied warranty of seaworthiness. Doubt concerning the ownership alone, could, in this case, increase the risk; and this was covered by the warranty of American property.

(c) *Williams v. Delafield*, 2 Caines' Rep. 329. *Urbain Duguit v. Rhinelanders*, 2 John. Cas. 476.

(d) 1 Marsh. on Ins. 475, per Ld. Mansfield.

(e) 4 East, 590.

Again ; the interest of De Wolf must have made a part of the preliminary proof ; and, indeed, the proof on the trial. The only thing which he could have communicated, was his bargain with Levy, that the latter should receive the cargo at Havana. This could not increase the risk ; for both parties were neutrals. The sentence of condemnation goes upon the ground that the property was De Wolf's when it left New York ; and that there was a fraudulent attempt to cover it as Spanish property, after it left Havana, by persons over whom De Wolf had no control. But it is enough that the underwriters knew the destination of the vessel. De Wolf had a right to suppose that the Spanish treaty would be observed ; and therefore was not bound to make any farther communication of facts which might increase the risk, even though they had not been covered with the warranty.

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S. Jones, in reply. It appears to me that in the multitude of discussion, the great features of the controversy have been overlooked. The real question is, whether the underwriters are bound to pay for captured property, warranted American, shipped and expressly destined to a Spanish port, at war with the colonies of Spain ; and under a contract of sale to the King of Spain. Being under a contract with the Spanish Intendant, the agent of the King of Spain, to supply him with provisions, Levy, in furtherance of this view, treated with De Wolf (among others) for articles deliverable at the port of Havana, Cavello or Lagaira ; Levy to pay for the cargo, with 5 per cent. on the invoice price, and the premium of insurance. Is not this a mere contract of purchase and sale ? Suppose De Wolf to have had the property then in his store, what feature is there in this transaction which does not strongly show a contract of sale ? The parties fixed on the price, the delivery in the West Indies ; and De Wolf was to procure insurance at Levy's expense. Surely the cargo was transported at the expense of the real owner. If De Wolf's, it must have gone at his expense ; If Levy's, at his. The latter was at the entire expense. He contracted to pay the freight.

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The contract divides itself into two parts: a contract of *sale*, and a contract of carriage. The Court ought to make the separation. Levy said, "I buy your goods, and charter your vessel to carry them." Accordingly, at the close of the contract, there is an allowance for demurrage, or running days, a clause decisively characteristic of a charter party. De Wolf said, "I will carry your goods." Then, I ask whether the delivery to the master did not complete the transaction? Gentlemen say that no sale is complete, till a delivery. Is this true in the sense contended for? Is it true that goods sold and shipped by a merchant abroad do not vest till an actual delivery at the port of destination? What is more usual than a consignment and delivery to a master, placing them at the risk of the master during the whole voyage? There is not one word in this contract fixing a condition to the delivery. The bill of lading imports an absolute delivery at Havana. Was not the master bound to deliver unconditionally, if Hernandez & Chavitau had required it? Had not Levy and his agents the unqualified control? Yes. Levy had placed the goods beyond the power of the shipper. The letters place them under the orders of Hernandez & Chavitau; and payment on delivery is not talked about in any of the documents. The cases cited on the other side, from Cranch and Wheaton, then, have no application. They relate to express clauses in the bill of lading and consignment, fixing the condition upon which the delivery was to take place. Parties have a right to make such contracts as they please; and they have so framed this, that it is executed from the beginning.

It is said the finding of the jury estops us to say, that the contract was absolute. It is only through some technical objection, some net work, such as this, that gentlemen can escape. This case is truly stated in the 20 Johnson, 214. The form of the case made it necessary that most of the evidence should be stated as coming from us. The preliminary negotiation is first stated; and the attempt is to infer the *executory* nature of the contract from this. But the true question is, what was the result? A sale of goods to be

paid for at Havana? No. The case states that the agreement was contained in the letters. To these alone are we to refer in order to determine what the contract was. What rule is better established than this: that let the negotiations be what they may, they all resolve themselves into the final agreement. *Vandervoot v. Smith*, (*f*) excluded a written negotiation, which clashed with that part of the contract relating to the voyage insured: That will be found a stronger case in favor of receiving the negotiation than the present one. The contract here is silent as to the time and place of payment. If De Wolf ever entertained the idea of payment at Havana, he gave it up. Indeed, such an idea is contradicted by every argument in the case. Did you ever hear of a payment to be made at the port of delivery, where there was not one word said about it in the contract? On goods thus arriving to a consignee, could he not compel the captain to deliver them, without paying him one cent? Levy was to have sent the vessel home on freight. Would a merchant, who is to receive pay at a foreign port, direct his vessel to return on freight? Would he not have ordered a return cargo? In this case, if a return cargo had been purchased, it was to have been paid for by bills on De Wolf. And even the ordinary expenses or disbursements of the vessel are to be paid in the same way. Then where was the cargo to have been paid for? No where. It *had been* paid for or secured, in New York.

If, then, there was no condition attached to the delivery, the property was changed on the shipment. This settles the question of American property. The warranty was violated; for the cargo insured was Danish. In regard to personal property, an unqualified right to compel a delivery from the vendor to the vendee, is a delivery. The property passes. Security to pay, at all events, is the same as actual payment. No matter what day is fixed, the goods are not responsible for the payment. If payment had not been made; if it was to have been reserved, till the result of the adventure should be ascertained; if there was a right in De Wolf to detain the property at Havana, till actual payment, what is easier than for him to have shown these facts

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(*f*) 2
Caines' R p.
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at the trial? The letter to Captain Pratt was signed by a confidential clerk, a competent witness, who could have been produced with the greatest ease, and who doubtless knew whether there was a payment or not. There was ample time between the contract, which was on the 21st of July, and the time when the vessel sailed, (the 4th of August,) for the parties to have changed their minds. A conditional obligation to deliver is wholly inconsistent with the circumstances, which should have been explained by evidence on the part of De Wolf. The only consignees were at Havana. They were to receive the cargo, or send it on to their own agent, over whom De Wolf had no control. Hernandez & Chavitau were the agents of Levy alone. They acted under instructions previously given to them by him, in relation to this, among other business of his, arising out of his contract with Spain. Thus, the loss happening at any time after the vessel left New York, from whatever cause, would have been Levy's loss; and it is immaterial in what point of light the vesting of the property in him is viewed; whether as a want of interest in De Wolf, under the policy, or a violation of the warranty. Take it which way you will, the result is the same—the policy is void.

As a further proof that the property was not intended to be deliverable at Havana, the captain knew nothing of any such intention, as is apparent from his examination before the Court of Admiralty. It could not have been inferred from the invoice. If the price was to have been a lien, would it not have been so marked upon the bill of lading? It is singular that it should have been the duty of the captain to retain the cargo till the price of the bill of lading should be paid, and yet that he should have no instructions on the subject.

But, at any rate, were not the acts done at Havana an execution of the contract? It is insisted that the captain was to keep De Wolf's property, as his agent, and not as captain of a general ship. For the purpose of delivery, a bill of lading makes a general ship. It is not material whether the master was the agent of De Wolf or not, if no act was to precode the delivery. Where the vendor ships goods, though

by his own vessel; it is a general ship, and the goods pass to the consignee by a delivery to the captain. If the ship be chartered, the vendee is owner *pro hac vice*. At Havana the captain tendered himself to the consignees, as in duty bound to do, and they accepted the cargo, and ordered it on to Porto Cavello. They gave new orders of their own. Could De Wolf have then gone to the port of final destination, and there have arrested the goods as a security for payment? No. The ulterior consignee would have told him that even his right of stoppage *in transitu* was gone.

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But it is said that the consignees had an election to receive the goods at Havana, or refuse, and order them on. Havana, then, was the port of election, where an election was in fact made by Levy. But his interference was, in truth, a mere control over De Wolf, as his carrier, and all he could have done, in case of De Wolf's disobedience, would have been to sue him for not going on. De Wolf could not have rightfully detained the property. Yet although it passed, it was all important to keep this out of view; and appearances are no argument against the secret truth. By concealment the parties were enabled to insure at a less premium. The cargo was more safe from the cruisers, and accordingly every letter is made to bear De Wolf's name.

The papers were false. The goods are called "owner's property." They are spoken of as "paying no freight," and the letters talk of sending the cargo on, *if it should suit De Wolf's interest*, when in truth he *had no interest*, and freight *was to have been paid*. In one letter he affects to treat it as a sale on his own account, and at his own risk. The sequel was a destination to Havana, "or a market," and the first consignees wrote a letter to the new ones, that the property belonged to "their friend in New York." It is asked, why did Levy use De Wolf's name instead of his own? Probably because he was known as the agent of the Spanish government.

But suppose it to have been intended that the cargo should all along continue in De Wolf, as owner. It is then material to inquire what effect such a shipment as this had upon the property. It was, under Levy's orders, deliverable to him

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(g) Per Chace,
J., 3 Dall. 224.

(h) 13 Niles,
Reg. 236.

(i) *United
States v. Pal-
mer et al.*, 3
Wheat. 610.

as the agent of Spain, during a war between that country and Venezuela. Could such a contract protect a cargo thus situated? It was shipped to the Spanish government; and I assume that it was destined to a Spanish army or navy. If it is necessary to show that war in fact existed, I refer to the authorities already cited, and to show that it was a lawful war, I refer to the declaration of independence by the Republic of Venezuela. Did not this make it an independent nation? Will Americans hesitate what answer to give to such a question? A people who have been trained to believe that their own declaration of independence separated them from the mother country as effectually in a political, as the Atlantic ocean does in a physical capacity? This opinion, too, has the sanction of our national judiciary, (g) and our national executive, (h) as we have already shown. Our Courts are to be guided by the views of the latter, (i) who considered Venezuela an independent government, at open war with Spain. The destination of this cargo was to parts of the country held by the enemies of Venezuela. Can this be the case, and yet a claim that it should be protected as neutral property, be tolerated? While the neutral is protected, you will not carry the doctrine so far as to destroy the rights of belligerents. Policy does not require it. We may yet be belligerents. An armed neutrality will not be found to answer the purpose, whatever may be our power. The civilized world have failed in such a project. We were lately belligerents, and while so, we found the exercise of belligerent rights necessary for our protection; and they were then fully recognized by our Courts. It is said that a trade allowable in time of peace is so during war. This we deny. Suppose you were invaded—would you allow a neutral to supply the enemy in your face? Substitute Venezuela for the United States, and the case supposed is the one under consideration.

The English rule is broad. It subjects property to capture, which will become enemy's property on its arrival at the port of destination. Of this there is no doubt; and giving the defendant in error his own ground, as to the nature of the contract, this rule is against him. It has been treated as a violation of the law of nations. It is not necessary for

me personally to vindicate Sir William Scott. All that is necessary in his vindication will be found in the decision of our highest Courts. The Court have already been referred to the language of Story, J., and during the late war almost every principle advanced by Sir William Scott, was recognized by our own Courts. These are rules, it is true, which apply with emphasis to the prize Courts: and I am not aware that we can go elsewhere to determine what is the law of nations in relation to capture. What other jurisdiction is there to determine the question of neutrality, and its effect?

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The meaning of the warranty is, that the property is American throughout the voyage, in reference to the belligerent parties. In *Vos & Graves v. The United Insurance Company*, (j) Radcliff, J., says, "It is a settled rule, that the insured, in order to comply with his warranty, must not only maintain the property to be neutral, but so conduct himself towards the belligerent parties, as not to forfeit his neutrality. He must pursue the conduct and preserve the character of a neutral."

(j) 1 Calnes
Cas. Err. 7.

The warranty was intended as a protection against a belligerent state. What is the law of nations on the subject of contraband, as settled by our own Courts, aside from either Scott or Story? *The Commercen* (k) goes the whole length of Sir William Scott's doctrine. It goes upon the law of nations—not local prize law, as supposed on the other side. It has also been said, that the reason of this case was, that the property in question did not grow in the country of the shipper; but in one part of the opinion, the case of provisions, generally, is put, without regard to their growth or production, and they are considered indiscriminately as subject to the same rule. It has been said, that the judgment was given by a divided Court, and a just eulogium was pronounced upon the Chief Justice, who, I aver, did not dissent from the principle of the case. His opinion goes upon the particular circumstances, and that this country ought not to interfere between England and Spain. He says, "The second ground taken is, that the carriage of supplies to the army of an enemy is to take part with him in the war,

(k) 1 Wheat
382.

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and consequently to become the enemy of the United States so far as to forfeit the right to freight." And when he comes to speak of this point, he says, "That a neutral carrying supplies to the army of the enemy, does, under the mildest interpretation of national law, expose himself to the loss of freight, is a proposition too well settled to be controverted ;" thus expressly recognizing the ground taken by a majority of the Court. The neutral forfeits the right to freight—as heavy a forfeiture as a neutral can be subjected to. As to this country, the party was a neutral ; and wherever a neutral loses his freight, he would lose the property, if his own. Not one exception to this rule can be found.

It is said that *Ludlow v. Bowne & Eddy* decides this case ; but it is distinguishable in all its important features. Payment was made a condition precedent to the delivery, and the Judges put the case on that ground. That was a shipment of general merchandize—not provisions—and (what is a very important distinction) it was a shipment to a private citizen. One shipping to the government is identified with that government. By its destination, the property ceased to be American, whether De Wolf knew of the purpose or not. He undertook, not only for his own acts but those of his agents and consignees. Suppose the vessel had unlawfully entered a blockaded port ; this would have been a violation of the warranty, as perfectly as if done under the immediate direction of De Wolf. This was not a delivery to a neutral Dane. He was the agent of Spain, and must be affected by the Spanish character.

But we are told that Venezuela was bound by the Spanish treaty. If so, perhaps she had no right to condemn. The treaty was made in 1795, and recognizes the principle that "free ships make free goods ;" but it goes on to except from this provision goods which are contraband of war. Was not this cargo, destined to feed the Spanish army, contraband within the exception ? But Venezuela was not bound by the treaty. She had become independent—broken all her relations with the Spanish Crown—assumed self-government—and no political relations, existing before the change, can bind her. She is bound by the law of nations, but no-

thing more. The treaty was a contract made with Spain. Suppose one party to a treaty loses its political existence—suppose it reduced to the dominion of another—the treaty is gone as to the country subjugated. The same principle applies in the present case. The cases cited to this point, on the other side, relate to St. Domingo, the existence of which, as a nation, it is well known, our government never would recognize. The message of the President, to which the court have been referred, shows the contrary as to Venezuela. She was at war with Spain, and has maintained her independence. An acknowledgment now would relate to her declaration of independence. We have ministers at almost every Spanish province in the South ; and we have, in terms, acknowledged them independent.

It would be, as supposed, immaterial what occasioned the loss, if the property passed at New York. The plaintiff below could not recover. If it did not pass at New York, then we say its American character was lost, from the relation which it bore to another nation. The warranty is prospective, like a warranty that a ship shall not sail before a certain day ; and though a violation of the latter warranty would have no effect in producing a loss by the perils of the sea, yet it would discharge the underwriters. The substitution of a captor to the rights of his enemy has been treated as new law ; while, in reality, it is as old as captures, and will not admit of a question. True, it comes back to the same question ; because we must first determine the capture to have been lawful. This was fully justified by the circumstances. These making out a case of fraud, the property may be considered as enemy's, or as contraband of war. The fact that it was condemned for want of proper documents, was in itself a violation of the warranty.

The argument, that the character of contraband is not a violation of the warranty, is answered by another part of the policy, which contains a warranty against any loss in consequence of seizure, "for or on account of any illicit or prohibited trade, or any trade in articles contraband of war." The Vice-Admiralty take the ground, expressly, that this cargo was made up of prohibited articles, and that they were so, in fact, has been abundantly shown.

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The question of fraudulent concealment, we are told, belonged exclusively to the jury. Admitted ; so far as it was a question of fact. But it is a mixed question of law and fact. We have all the facts found which we require to make out the concealment, to put De Wolf on inquiry, and charge him with notice of the unlawful destination of the property. It is said that this was covered by the warranty, and therefore we cannot complain of concealment. If so, it is indeed true that we want no more. Either view will equally answer our purpose ; and we contend for it as a fraud, merely because we understood gentlemen to say, at one time, that fraud would not be a violation of the warranty. The risk was increased by the fraud. In the prize Courts, every suspicious circumstance is greedily seized upon as evidence ; and every act of disguise is justly considered a cause of suspicion. Nor let it be supposed that the increase of premium was to pay for the risk arising from this circumstance, from Havana onwards. It is well known that these seas abounded with pirates, which was a very good reason for enlarging the premium, independent of the war.

Emmet, here mentioned that in *Vandervoort v. Smith*, which had been cited in the reply, it was decided merely that parol evidence shall not be received to contradict the policy. But he said, there is no case in which a contract may not be explained, or supplied by previous negotiations between the parties, in a particular wherein it is silent.

As to the new supposition which had been started that the payment for the cargo might have been *secured* in New York, he said this would leave the matter just where it was before. There would still be a lien on the goods for payment, notwithstanding the security

No fact en-
hancing risk
withheld.

THE CHANCELLOR. 1. Did De Wolf withhold from the insurers any fact increasing the risk insured ? The case does not show, otherwise than from the policy, what representation of facts was made by De Wolf to the insurers ; nor is it stated that he communicated, or that he withheld, any particular fact. But it has been assumed, that the con-

tract between De Wolf and Levy, was not disclosed ; and it is urged, that this contract should have been made known to the insurers. I do not perceive that this contract enhanced the risk. This contract does not show, that the government of Spain, had any concern in the transaction. De Wolf was ignorant, that the cargo was destined for the use of that government ; and Levy was a Danish merchant. Had this contract been exhibited to the insurers, they would have learned from it, the rights of Levy and De Wolf against each other, and that Levy, a neutral was to become the proprietor of the cargo, at the port of delivery, after the insurance would cease. These circumstances, did not expose the cargo to any peril, which can be perceived, as an obvious, or ordinary result from such facts ; and the contract, therefore, seems not to have varied the risk, in question. It is not found, as a fact, that the risk was increased, by this contract. This question, so far as it is one of fact, was open to proof ; and so far as it is a question of law, we are not at liberty to say, that a contract valid by our law and the law of nations, enhanced the risk insured.

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2. Was the cargo American property, according to the stipulation of the policy ?

Cargo was
American pro-
perty.

Payment for this cargo was to be made by Levy to De Wolf, on its delivery, at Havana, Lagaira, or Porto Cavello. This appears distinctly, from the negotiation which preceded the written contract between the parties. The letters forming the written contract, are silent in respect to the time or place of payment ; and this omission of a matter so important, is somewhat mysterious. As the case stands, we must either take the verbal agreement upon this point, or proceeding upon the written contract, we must supply its silence by the general conclusion, that where no time of payment is stipulated, the price of the thing sold, is to be paid, on its delivery to the purchaser. It must, accordingly, be taken as a part of this case, that payment was to be made by Levy to De Wolf, when the cargo should be delivered at one of the three ports. This being so, the case before us, is the ordinary contract, by which the vendor, engages to deliver the thing agreed to be sold, at a future time, and the purchaser

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engages to pay the price, when he shall receive the thing purchased. In such a case, the property in the thing, which is the subject of the contract, remains in the vendor, until the delivery. The present case is, in this respect, exactly like that of *Ludlow v. Bowne & Eddy*, 1 John. 1. In that case, the Supreme Court held, that goods shipped in circumstances like these, remained the property of the consignor until their delivery; and I entirely approve that decision. The reasons of the Supreme Court, in support of its decision, in that case, are a sound and just exposition of our own law, and the law of nations.

The transactions concerning this cargo, at Havana, did not change the property. It is not stated that Hernandez & Chavitau were subjects of Spain; but such they probably were; and I assume the fact, as it has been assumed in the argument. Hernandez & Chavitau were mere agents. They were the agents of Levy, to accept for him, the cargo at Havana, or to decide for him, as he had a right to decide, that the cargo should proceed to one of the other ports; and they were the agents of De Wolf, to direct the master of the vessel, to proceed. They decided for Levy not to receive the cargo, at Havana. They directed for De Wolf, that it should proceed. They did nothing beyond the scope of their powers; and De Wolf continued the owner of the cargo. The result is, that the cargo was the property of De Wolf at the time of its insurance, during the voyage, and at the time of its loss; and consequently, the warranty of American property, was fulfilled.

No fraud sub-
jecting cargo
to condemna-
tion.

3. Was there any fraud justly subjecting this cargo to condemnation? This inquiry, and the last, concerning the due performance of the warranty, are in effect, nearly the same; but for the sake of distinctness, they are thus stated. Considering the cargo as belonging to De Wolf, it was the property of a neutral, in the war then existing between Spain and Venezuela. But this cargo, though thus neutral, was destined for ports in the possession of Spain, and for the use of its government. These facts did not subject the cargo to condemnation, by the law of nations. The articles composing the cargo, were not contraband of war; and here was

no blockade. The destination to a belligerent country, was perfectly lawful. To say that it was not so, would be to say, that a neutral cannot hold commerce with a country at war. The right of neutral and peaceful states, to carry on commerce with countries at war, excepting in contraband articles, and excepting with places in a state of blockade, is perfect and unquestionable. If monarchs have sometimes decreed, and if Judges of prize Courts have sometimes declared, that the mere destination of neutral property to the country of their enemy, shall subject it to condemnation, they have abused their power, and have violated a fundamental principle of the law of nations. It is the duty of all courts of justice, and of all nations, to resist an encroachment so unjust, so subversive of the rights of peace, and so unnecessary to the rights of war. The cargo in this case, was to be delivered to Levy, at one of the three ports, and was to be by him delivered to the Spanish government. In this, I perceive nothing forbidden by the law of nations—nothing which deprived the cargo of its neutral character, during the voyage—and nothing of fraud. A government at war, may, like any of its subjects, contract to purchase the property of neutrals, when the articles shall be brought into its own dominions; and a neutral may contract to deliver his own goods in a belligerent country. The question which may always arise in such cases, as it arises here, is, whether the contract is a fraudulent disguise, to give to the property the character of neutrality, during its transit, or not—whether the property, in truth, belongs to the neutral or to the enemy. The principle of the law of nations, laying out of view the case of contraband articles, and the case of places actually invested, is, that the property of a neutral in its passage to a country at war, is free, and that the property of the adverse belligerent, is subject to capture and forfeiture. There are, in general, strong motives to place all property destined to a country at war, under the guise of neutrality; and these motives are powerful, in proportion to the prospect of gain and the danger of loss. Hence contracts, documents, and formal transactions bearing the utmost appearance of verity, are often contrived, to conceal

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trals to carry
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the Property of an enemy, under the mantle of a friend. If belligerents commit violence, neutrals commit frauds ; and the rights of war, as well as the rights of peace, must be maintained. Courts before which these questions occur, therefore, have and must have, power to penetrate the secret truth of the question, whether the property is, in good faith, neutral or not : and it must always be a question, in each particular case, whether the garb of neutrality, is genuine or fictitious, real or collusive.

Agreement
that property
shall remain in
neutral till de-
livery, lawful.

In this case, the cargo was certainly neutral, when De Wolf and Levy were about to make their contract ; and it probably, comported with all their views, that it should remain neutral, until its delivery at one of the three ports. There seems to have been no sufficient motive on the part of either of them, for any disguise of the real ownership. They were at liberty, to agree, that the cargo should remain the property of De Wolf, until its delivery at Havana, Laguirra or Porto Cavello ; and they did so agree.

The real facts are certainly, in some degree, disguised by the bill of lading, the letter of instructions from De Wolf to the master, and the letter from De Wolf to Hernandez & Chavita. These documents were prepared, several days after the insurance ; and the bill of lading, at least, went in the vessel. The bill of lading, stated no destination beyond Havana : the letters are silent respecting any delivery at Laguirra or Porto Cavello ; and they indicate, that the disposition of the cargo at Havana, either by receiving it there, or by sending it to another port, was to be on account of De Wolf. So far as these documents are silent, in respect to any matter which the parties were at liberty, to insert in them or not, the omission is neither extraordinary nor culpable ; but so far as they represent that the cargo was to be disposed of, on account of De Wolf, and for his best advantage, they are untrue, according to all the other facts in the case. This representation exposes the case to some suspicion ; but it cannot outweigh the force of all the other undisputed facts.

Not a dis-
guise of Spa-
nish property.

Upon all the facts before us, this was not a fraudulent disguise of Spanish property, under the name of De Wolf

It may be a case of some suspicion; but no fraud is proved; and no satisfactory conclusion of fraud can be derived from the facts. To adjudge this transaction, fraudulent, would be, to substitute suspicion and presumption for proof, in a case where no adequate motive for fraud appears, and where no fraud has been found by a jury.

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My opinion is, that this cause has been rightly determined by the Supreme Court.

BRONSON, Senator. This was an action brought by De Wolf, in the Court below, to recover 20,000 dollars, insured by the defendants below, The New York Firemen Insurance Company, on the cargo of the brig George Washington laden at New York, with liberty to discharge at Havana, Lagaira or Porto Cavello, the premium being regulated according to the length of the voyage, and the number of ports visited.

Case stated

This cargo was purchased and shipped under a contract with Moses E. Levy, of St. Thomas, deliverable at either of the above ports, as he might elect; and the price of freight regulated according to distance. It was captured between Havana and Lagaira, and condemned as Spanish property. This Levy turned out to be an army contractor, and intended the cargo for the Spanish troops.

The important question is, whether this was American property; it being warranted such, by the assured: and here it may not be improper to remark, that, as warranties form an important part of these contracts of insurance; and, from their nature, the assured only can know the truth or falsity of them, the interests of commerce, as well as public justice, require that they should be strictly performed.

The ques-
tion.
Insurance
warranties
should be
strictly per-
formed.

In the present case, if the cargo belonged to any one other than an American, it constituted a good defence to the action. It is of no importance, therefore, whether it should prove to be the property of Levy, the Dane, or of the Spanish government; for, although in the first case (it being still neutral) the risk would not be increased, yet the underwriters would, in either event be discharged. The contract would be void *ab initio*. De Wolf having, in the out-set,

If cargo not
American, po-
licy void.

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But it was
American.
And why.

violated the contract on his part, no risk was ever undertaken by the insurers. But a careful examination of all the facts and circumstances, attending this case, has brought me to the conclusion, that the cargo, when captured, was American, according to the terms of the warranty ; and for the reasons assigned at length by the Court below :

1. That the title had not vested in Levy, at Havana, he having refused by his agent, to receive the cargo at that port.

2. It does not appear that De Wolf knew, that it was ultimately destined for the Spanish troops.

3. His warranty superseded the necessity of disclosing to the underwriters, any circumstances in relation to the national character of the property, or the transactions of the voyage.

It remains to reconcile some of the circumstances attending this transaction, which have been urged by counsel against the American character of the property, with the above result. I shall do this, without inquiring whether these are matters which should have been referred to the Court and jury below, as contended upon the argument.

Objections.

The circumstances urged with the most plausibility and effect are,

1. That no payment was to be made, on the delivery of the cargo in the West Indies ; and hence the inference, that it was paid for in New York, and became the property of Levy at that place :

2. That Levy exercised acts of ownership, in controlling the property at Havana by his agents ;

3. The false and deceptive instructions relative to the disposition of the cargo given by De Wolf to Hernandez & Chavitau ; and by them again to their agents at Laguiria and Porto Cavello.

Obviated.

Unimportant when, how where payment was to be made.

It does not appear to me important, when, how, or where the payment was made. The parties might arrange that to suit their interest or convenience, without affecting the character of this property. Levy would have been legally bound to pay for the cargo, freight and insurance, whenever proof should have been furnished of the safe delivery ac-

· cording to contract; and if, in the meantime, he should have advanced for a part, or the whole amount of the cargo, he would be entitled to recover back the advance, on the failure of De Wolf to fulfil on his part. Beside, from the nature and terms of the contract, De Wolf would not be likely to have received payment in the West Indies, unless it were in bills of exchange; for it seems his first wish was to procure a freight for his brig; and he did not expect, therefore, to require his own funds to load her; and the insurance of his money home, would probably have cost nearly as much as that on the cargo out, which was 7 per cent. It will be recollected, that he was to receive but 5 per cent. for his profit on the whole transaction.

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It was proper, and, indeed, necessary to alter the bill of lading at Havana, when the destination of the brig was altered. The underwriters must have contemplated such an alteration; and this too by Spanish agents. To have made a new bill of lading at this port, would have exposed the cargo to still stronger suspicions and greater risk; and this could not have been done without manifest absurdity and falsehood on the face of it; the cargo not having been shipped at that place.

Bill of la-
ding properly
altered.

As to the deception practiced by De Wolf and the agents, in ordering a disposition of the property, its existence is to be regretted. It is desirable that the utmost fairness and consistency should be stamped on these transactions throughout. But I cannot perceive that the underwriters have any cause to complain. It must be conceded, that if this cargo had been consigned directly to Levy himself, or even to the Spanish Intendant, it would not have invalidated the policy. Although the cargo was ordered to be sold, when it appears no such thing was intended, yet it was placing it under the ordinary circumstances of American cargoes, bound to these markets for sale. It was a deception calculated to lessen the risk, and benefit the underwriters; as it served to impress more strongly on the property its real and American character, than would have been done by a naked consignment.

Deception
not in a mate-
rial point.

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WHEELER, Senator. This case would seem to depend on one of the following questions: 1. Was the delivery of the cargo to Levy, either in fact or construction of law, made in New York? 2. Or, if not made there, was it made to Hernandez & Chavita, as the consignees of Levy, on the arrival of the brig at Havana?

If the delivery was made to Levy, either in fact, or in construction of law, at any time previous to the capture or condemnation of the cargo, no question is made, but that the warranty of American property was violated, he being, at the time of the delivery, a resident of St. Thomas.

The case
stated, and the
evidence con-
sidered.

It is in proof that Levy, a resident merchant of the neutral or Danish Island of St. Thomas, entered into a negotiation in the city of New York, with De Wolf, an American citizen, and a merchant of that place, for the purchase of a quantity of provisions. This negotiation terminated in an agreement between the parties, the terms and conditions of which are contained in their respective letters, bearing date the 21st July, 1818. All the evidence throwing light on this transaction, is contained in the letters of contract; in the letters of instruction to Capt. Pratt, the master of the George Washington; in a letter from De Wolf to Hernandez & Chavita, of Havana; in the letters of advice from the latter to their correspondents at Porto Cavello and Lagaira, and in the sentence of condemnation by the Vice Admiralty Court of the Republic of Venezuela. It is principally from the above correspondence, that the facts in this case are to be deduced: and, *prima facie*, there is nothing upon the papers, when viewed separately, to falsify the stipulation that the cargo was American property. But when we connect these papers, and examine them as originating in, and growing out of one entire adventure, the evidence which they afford is by no means obscure.

Negotiation
between Levy
and De Wolf.

The negotiation, between Levy & De Wolf, was settled by their agreement on the 21st of July. On the face of that agreement, De Wolf contracted to purchase and to ship on board the Warrior and the George Washington, at the port of New York, a certain quantity of provisions; and to deliv

er the same, at a stipulated price, for the freight, either in Havana, Lagaira, or Porto Cavello.

Was the purchase originally made on the account and at the risk of Levy? or was it a contingent agreement, resting upon a precedent condition? Levy says, in his letter to De Wolf, (and, with the exception of this letter, it will be perceived that his name was cautiously concealed as a party to the voyage,) "I am desirous of purchasing of you, deliverable at the Havana, Lagaira, or Porto Cavello, a certain quantity of beef, pork, &c.," and he closes by agreeing to pay freight, at a certain or fixed rate per barrel.

If this letter and De Wolf's answer were the only evidence in the case, then the delivery would appear to rest on a precedent condition; and Levy would not have been bound to make payment for the cargo, including insurance, commission and freight, before the delivery; but they are followed by the letter of De Wolf to Hernandez & Chavitau, and stand connected with their acts in relation to the George Washington and her cargo, after her arrival at the port of Havana. This correspondence, and these acts go far to elucidate the real character of the voyage.

Levy was a resident merchant of St. Thomas, a Danish and a neutral island; but he stood compromised with the Spanish government, as a contractor or purveyor of navy or army supplies; and there is nothing in the proof to lessen the presumption, that he was, in reality, a native subject of Spain, and a mere denizen merchant at St. Thomas.

In the letter of De Wolf to Hernandez & Chavitau, enclosing the invoice of the cargo, he requests them to receive and dispose of the same to the "*best advantage on his account*;" and he is utterly silent, as it respects the contract of delivery, at a price certain to Levy. Here, then, was evident design, in case the vessel should be boarded by an enemy of Spain, to conceal the true character of the property; or why not direct Hernandez & Chavitau to deliver the cargo to Levy, on his complying with the conditions of the agreement of the 21st July. The agreement was to deliver to Levy, at a price certain: the letter of advice directs the cargo to be "sold to the best advantage on De Wolf's account."

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Whether said
was contin-
gent.
Levy's letter

And
Wolf's
answer. D
an

National char-
acter of Levy

Letter to
Hernandez &
Chavitan

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Evidence of
payment in
New York

This letter, also, authorizes Hernandez & Chavitan to draw on De Wolf for all disbursements ; and they authorize their correspondent at Porto Cavello, to draw on him in New York, in the event of purchasing a return cargo, for 10,000 hard dollars. Here, then, is a presumption, strong, if not conclusive, that the shipment was paid for by Levy in New York, before the sailing of the ship ; or why draw on De Wolf, for the purchase of a return cargo, if the proceeds of the outward cargo were to be paid for by Levy, on delivery in a Spanish port ? or if the cargo was to be sold to the best advantage on De Wolf's account ? for, in either event, De Wolf must have had available funds at the port where the cargo should be delivered. Then why draw on him for 10,000 hard, or silver dollars, payable in New York.

De Wolf farther instructs Hernandez & Chavitan, " If you think it best for my interest, to send the vessel to any other market, say to windward, you may do it ;" but, in that case, he adds to the cost of the flour, as he expresses it, \$1 50 per barrel, this being the precise sum which Levy contracted to pay, in case he directed the cargo to be delivered, either at Porto Cavello or Laguiria.

Levy cau-
tiously con-
cealed.

Here, then, again, on the face of these papers, De Wolf authorized the vessel to be sent to any other market, " say to windward," and Levy is cautiously concealed, as a party in interest, although the contract with him, on the faith of which the shipment was expressly made, places the designation of the port of delivery under his absolute direction and control. It stands proved in the case that Hernandez & Chavitan were the persons selected by Levy to be the consignees of the cargo at Havana ; and further, that they had his instructions as to its future disposition. Then why this ambiguous letter of De Wolf, if it was not to conceal the true character of the property ?

Bill of lading
altered, &c.

On the arrival of the George Washington at Havana, Hernandez & Chavitan altered the bill of lading, on their own mere motion, by inserting after the words " at the port of Havana," the words, " or a market ;" and directed the cargo to be delivered to Gerardo Patrullo, at Laguiria, stating that this order was given in consequence of the " low prices

of flour and pork at Havana." Here is another discrepancy in this transaction. The fluctuations of the market could not affect De Wolf, as Levy had agreed to pay a stipulated price for the cargo. Much less could it concern Levy; for he was made safe by his contract with the Spanish government. The cargo, when *in transitu*, was most clearly not *to a market*, but *to a Spanish depot of arms*.

The vessel, in pursuance of an order of Hernandez & Chavitau, with an altered bill of lading, which was originally special, but was, by the alteration, made general in its terms, left Havana, but with special instructions to deliver the cargo, either at Lagaira or Porto Cavello; and when near the first mentioned port she was captured by a Venezuelan privateer, her cargo libelled as Spanish property, and condemned, as such, by a Vice Admiralty Court of the Republic of Venezuela, which was at war with Spain. This case arises out of the claim made by the party ostensibly injured, against the insurers, for a total loss.

The insertion of the words, "and a market," extended the authority of the captain to the utmost limits of his discretion. The policy, and the contract with Levy, referred to three ports only, either of which was to be designated by Levy; but here was a general latitude given by Hernandez & Chavitau, on the face of the bill of lading which extended from island to island, to dispose of the cargo, although proved that it was disposed of to Levy, before it left New York. The alteration of the bill of lading increased the risk; for that very alteration, from its having been made in a belligerent port, and by a belligerent, was calculated to create suspicion of an attempt to mask the property under a neutral flag. That suspicion would add to the chances of its condemnation, on the ground that innocence never seeks concealment. The republic condemned the cargo, as belonging to her enemy, and released the ship as the property of her friend. In this, she did precisely what an American Court would have done, in similar circumstances.

The loss is positive, and it must fall either on our own citizens, or on the citizens of Spain, or a citizen of Denmark. The Vice Admiralty Court of Venezuela adjudged the pro-

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De Wolf

Vessel pro-
ceeds, and is
captured, and
cargo con-
demned.

Alteration of
bill of lading
an excess of
authority.

And increas-
ed the risk.

The evidence
justified the
condemnation.

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perty to be Spanish, and condemned it as such. It was captured when entering a Spanish port, and a depot of arms. The description of the cargo, as well as its destination and object, viewed in connection with the letters of Hernandez & Chavatau, and the suspicious interlineation, made by them on the bill of lading, together with their order on the back of it, clearly justified the condemnation. Neither party, for aught we see, has complained that this was an unjust sentence.

When foreigners, and more especially belligerent foreigners, (and I consider Levy to have stood in the latter character, for he had violated his obligations of neutrality, by committing himself with Spain, *flagrante bello*,) seek the aid of our citizens to effect insurance, under the specious mantle of American property, they have no right to complain of the strictness of our Courts in scrutinizing their acts, and in protecting our insurers against frauds upon the American flag.

This property was warranted to be American. It was adjudged by a foreign tribunal to be Spanish. If the decree of that tribunal was correct, the warranty was false; and, consequently, the policy has been broken on the part of the assured; and there is an end of the question. The policy became void.

Insurers are necessarily strangers to the secret objects of other parties, who may frequently be stimulated by the hope of gain, to combine for the purpose of covering belligerent property, under the semblance of neutrality. In such cases, all the circumstances which give character to the property insured, and develop the ulterior views and intentions of the parties, are wholly under the control of the insured, who may, and probably will, forever be influenced by interest to suppress or conceal such papers as throw light on the merits of the case. The insurers, at common law, have no power to compel a disclosure; and the insured, it may be supposed, will cautiously conceal every fact which militates against himself.

But, as it has been settled, in this place that the sentence of a foreign Court of Admiralty shall not be received as con-

elusive of the character of the voyage, the decree of the Venezuelan Court can only be taken, in this case, as *prima facie* evidence that the cargo was Spanish property. A summary of the facts, with which I shall conclude, will show how far that decree is sustained or impeached by the evidence given in the Supreme Court.

Spain was engaged in a war with the republic of Venezuela. Levy, at that time, a resident merchant of a neutral island, engaged with the Spanish government, to supply the Spanish forces with certain provisions and clothing. He came to New York, and entered into a bargain to purchase of De Wolf, a citizen of the United States, articles corresponding to those which he had engaged to deliver the Spanish Intendant. De Wolf purchased the articles, and insured the property as American; and by an agreement with Levy, fixing the price of the freight, shipped the articles on board his own vessel, to be delivered at a Spanish port, a military and naval depot.

The vessel arrived at Havana, and was ordered to a second military depot, with her cargo; and on her voyage thither, she was captured by a Venezuelan cruiser, and her cargo condemned as enemy's property.

The letters of De Wolf, of Levy, and of Hernandez & Chavitau, carry with them strong evidence of a fictitious dress. Levy contracted, in New York, for the property; and the port of designation was placed at his disposition. Yet you hear nothing of him after he is lost sight of as the purchaser in New York. There is evidently a studied concealment in the papers, of Levy's agency in this business; and the conclusion, to my mind, is irresistible, that the ship was not ordered from Havana to a "better market," as Hernandez & Chavitau allege; but, in fact, she was directed to Lagaira, by order of the Spanish Intendant. Levy was under the control of the Intendant. The provisions must have been known, on the arrival of the ship at Havana, as articles purchased on Levy's contract, for the use of the Spanish government; and it is too much to suppose, that any nation, at war, would for a moment permit an agent or con-

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tractor to divert, or control, at his mere will, munitions expressly purchased for the use of its army or navy. *The property has been adjudged to be Spanish.* by a foreign tribunal, and the evidence in the case confirms the correctness of that decision.

I, therefore, am of opinion, that as the warranty has not been sustained, the judgment in the Court below should be reversed:

ERWIN & THORN, SENATORS, concurred.

The other members of the Court concurring in the result of the opinions delivered by THE CHANCELLOR and BRONSON, Senator—

For affirm-
ance, 20—For
reversal, 3.

It was thereupon ORDERED, ADJUDGED and DECREED, that the judgment of the Supreme Court be affirmed; and that the plaintiffs pay to the defendant his costs, &c., and that the record be remitted, &c.

CHARLES AUGUSTUS DALE & others, appellants,
against
CHARLES M'EVERS & others, respondents.

Where the complainant in Chancery omits to reply, and sets down the cause for hearing on bill and answer, the latter will be taken as conclusive proof of the facts which it sets up by way of defence.

If the complainant mean to question the truth of the answer, he should reply, and give the defendant an opportunity to take his proofs.

A mortgagee may pay off a senior incumbrance; and on bill filed to foreclose, and to be reimbursed the sum which he has paid, he is entitled to a decree for indemnity out of the proceeds of the sale of the mortgaged premises.

But whether, if he purchase the mortgaged premises under the senior incumbrance, he can have a decree for the price which he has paid, to be allowed out of the proceeds of a sale under his mortgage? *Quere.*

Whether, in judgment of law, the interest which he thus acquires as purchaser is a full equivalent for the money which he pays? *Quere.*

Where W. held a mortgage against F., on lots in the city of New York, subject to a tax due to the corporation, and the lots were sold at auction for the tax, and the executors of the mortgagee bid them in for a term of

one year, at the amount of the tax, and then filed their bill praying to be reimbursed by a sale of the mortgaged premises under a decree of foreclosure; *held*, that they were purchasers in their own right, and must rely upon the use of the premises, during the term, for their reimbursement.

A tax laid upon real estate in the city of New York, for the purpose of opening or improving a street, &c., takes preference of a prior mortgage.

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APPEAL from the Court of Chancery. The respondents are the executors of Hugh Williamson, deceased, who was the assignee of a mortgage given by Robert Fulton to one Bonsall, in June, 1814, upon certain lots in the city of New York. Pending the proceedings which had been instituted in the Court of Chancery, for the purpose of foreclosing the mortgage, the corporation of the city of New York, under the authority vested in them, for the purpose of opening and laying out streets, (2 R. L. 408, 409, &c.,) imposed upon the mortgaged premises an assessment of \$1485 92, which not having been paid by the representatives of Fulton, the corporation proceeded to collect, agreeably to the provisions of the 259th section of the act in relation to the city of New York, (2 R. L. 442.) By that section the corporation are authorized, in cases in which the owners of lots, upon which assessments have been made, refuse or neglect to pay the assessment, after proper notice and demand, "to advertise the lots, and sell them at public auction, for the lowest term of years at which any person or persons shall offer to take the same, in consideration of advancing the sum assessed upon them, together with interest and all costs and charges which have accrued thereon. And the purchaser is authorized to enter upon and enjoy the premises until his term therein shall be fully complete and ended." The respondents became the purchasers of the premises in question, at the auction. for the term of one year. They took a lease from the corporation for the year. The original bill of foreclosure was filed by Williamson, and proceeded to a final decree. Williamson then died, and the above sale having been made to the respondents, his executors, they filed their bill of supplement and revivor, claiming a right to retain the amount thus paid by them, in addition to their mortgage debt, out of

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the proceeds of the mortgaged premises, on the ground that if they had not become the purchasers at auction, the premises would have been sold for a long term of years, during which time the right to sell the mortgaged premises would have been suspended—that the purchase by them being compulsory, they ought to be reimbursed the amount thus paid. The appellants, (the defendants below,) admitted in their answer, that an assessment of \$1400, was imposed by the corporation upon the mortgaged premises—that they were put up at auction for the payment of this assessment; and that the terms of the sale were, that the person who would pay the assessment for the use of the premises during the shortest term, was to be considered the highest bidder—that the respondents became the purchasers at such sale, being the highest bidders; having agreed to pay the assessment for the use, rents and profits of the premises, for one year. They expressly denied that the respondents were compelled to purchase the premises to prevent them from being sold for a great number of years; and alleged that if the respondents had not become the purchasers, they would have been sold upon the offer of the next highest bidder, for only one year more, at all events; and, perhaps, for but a few months beyond the term of one year. They denied that they ever authorized the respondents to make the purchase on the account, or for the benefit of the appellants.

No replication was filed, and the cause was heard upon bill and answer, without proof.

The Chancellor decreed, that the payment by the respondents was compulsory, and formed a just and equitable charge, for which they ought to be reimbursed and indemnified out of the proceeds of the sale of the mortgaged premises; and that they be reimbursed, &c., accordingly.

The appeal was from this decree.

S. A. Foot, for the appellants. There was no legal necessity for the respondents to make the purchase. But suppose they were obliged to purchase in order to save themselves, they have no right to be reimbursed by the sale. This is not the ordinary case of a senior lien, which affects

the whole title or interest in the property. Had it been so, perhaps the decree would have been correct. It is not necessary for us to deny, that at a sale under a lien which affects the whole interest, the junior mortgagee may purchase, and be entitled to reimbursement out of the fund to be created on a sale upon his own lien. He would have the legal estate; and, as in other cases, might follow the fund arising from the last sale.

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But here, only a small part of the title is affected. What is the thing sold? Merely the use of the property for a given time. The law knows no value of property, except what it will fetch in the market, and it was worth no more to Fulton's representatives. The respondents gave the market value, and had the appellants purchased, they must have done the same. It was of no consequence where the property went for this short period. It could have been no more than the use for a few years, leaving junior liens to their full effect after the time expired.

The answers positively deny the necessity of this purchase, and not being met by a replication, they must be taken as true. They say that the term in these lots was put up at auction, and sold at its fair value; and that if the respondents had not purchased, it would have been sold for but little more than the year. It would, at most, have extended to no more than two years.

Again: the respondents are purchasers. They took a lease of the corporation, and we must presume they went into possession under it. On the fund coming in they asked, and were allowed by the decree, to rescind their contract, after having had the use of the property, for which they are not even required to account, at any rate. *Cowell v. Simpson*, (a) shows how liens are waived or removed. The Court are also referred to *Gilman v. Brown et al.*, (b) on the same subject, and *Law of Lien*, ed. 1822, App. 218, &c. The case of *Codwise & others v. Gelston*, (c) exhibits the principle on which a fund may be followed into the Court of Chancery. It rests upon the ground of a lien at law, which the party may enforce at the time of the sale; and it appears to me that he ought, if he purchases, to be confined

(a) 16 Ves.
275.
(b) 1 Ma-
son's Rep. 212
to 219.
(c) 10 John.
507.

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v.
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to what he acquires by the sale. The lien is gone by the purchase, and he cannot follow the fund. The right to follow is in virtue of the lien, and is destroyed with it. It is an acknowledged rule, that where the conduct of the party is such as to show that he does not mean to retain and rely upon his lien, it cannot be enforced. The respondents should have bought in the lien created by the assessment, or they might have paid directly, and a Court of Equity would have allowed them to stand in the place of the creditor. One of these is the course, as dictated by the authorities; but the respondents have not chosen to take them as a guide. Is it not plain, then, that they intended to look to some source of remuneration other than the fund to be created by the sale?

J. O. Hoffman, for the respondents. It is easy to draw nice distinctions of law; but principles must always more or less depend upon the particular circumstances of each case. The first sale under the decree of the Court below was set aside on the ground of surprise, (3 John. Ch. Rep 290,) and it appears by the case that very great indulgence has been given to the appellants, as to time, in raising the money.

The parties stand in the relation of mortgagee and mortgagor. The former can never hold a term upon the mortgaged premises, as an incumbrance. It would merge on becoming united with his estate as mortgagee.

The mortgagee is entitled to be reimbursed, in this case, upon the same principle that would entitle him to a compensation for improvements upon the mortgaged premises. Here the respondents have, by their purchase, bettered the estate, in raising an incumbrance which would, at least, have materially reduced its value. The statute (2 R. L. 491, s. 37) makes the assessment a lien overreaching all other incumbrances, though prior in point of date. A mortgagee pays the ordinary taxes upon land: Would he not have a right to be reimbursed? The 38th section (2 R. L. 38) gives a remedy by action, where money is paid by one, which should, by law, have been paid by another. The

mortgagor, in this instance, ought to have paid and kept the security good. Not having done so, payment by the mortgagee became necessary, in order to save the security. For whose use was the payment made? That of the mortgagor. That the incumbrance does not go to the whole fee, makes no difference. The object was to save the lien. If the mortgagee had stood silently by, the premises might have gone for 21 years; which would have been a virtual defeat of his claim. It is said, he might buy or sell subject to such a lease—that the incumbrance did not go to the whole fee; but the premises might be worth nothing, subject to such an incumbrance. The remedy suggested would put everything to hazard. A lease for but few years, such as the answer supposes might have been the result of our silence, would have destroyed our present lien, and increased the risk of loss.

We did not, as supposed, purchase in our own right. We had no power to do this: the lease was not ours, but enured to the benefit of the mortgagor, who was bound both in justice and honor to pay it. Form should give way to substance. If there was, as the Chancellor declared, a legal necessity for securing this incumbrance in the hands of the mortgagee, it is not material, whether it was by assignment from the corporation, or payment or purchase of the term.

Foot, in reply. The case is considered mere form, but it was matter of substance to the appellants. If of no importance, it was easy to stop at the bid, and never obtain the lease. That one who pays an assessment, which is justly due from another, may recover it by action, is an argument against the remedy in equity. The respondents should have paid the money, and resorted to their direct legal remedy; or, perhaps, they might then have filed their bill for relief. A year, or even six months possession of the property, might have been worth the tax, and we should have had the benefit of it, had the lease been out of the way. But the respondents bought, and by their own acknowledgment, acquired the full value of their purchase,

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and we complain that they, notwithstanding, charge us with the consideration which they paid. The case in Johnson's Reports has nothing to do with the question here. Nor can there be a merger when it appears plainly by the conduct of the respondents, that they intended to keep the legal and equitable estates separate from each other. It is a singular doctrine, that a legal term is merged by its union with a mere security, as the right of the mortgagee is always holden to be in equity. It is but a chose in action.

Answer must
be taken as
true.

WOODWORTH, J. gave his opinion nearly as follows:—
This cause having been heard in the Court below, upon the pleadings, the defence set up in the answer must be taken as true; and the only question is, whether the respondents are to be reimbursed what they paid, as bidders and purchasers at the auction.

Tax equivalent to a senior mortgage or judgment.

The corporation had a right to impose this tax, and when laid, it became a *lien* on the lots, overreaching the mortgage of the respondents. (2 R. L. 420, s. 186. Id. 442, s. 259.) It was, as to them, equivalent to a senior mortgage or judgment; and the assessment not being paid after proper demand and notice, the corporation had a right to sell the lots for such a term of years as the purchaser at auction should consider worth the amount of the tax. They did so sell; the respondents bid this amount for a term of one year, and became purchasers of the mortgaged premises for that time, taking a lease of the corporation.

It is now urged that the respondents have not brought themselves within the rule which allows a junior incumbrancer to pay off a senior incumbrance and tack it to his own; that they are not to be regarded as having extinguished this incumbrance by payment, but by a purchase under it for their own benefit.

Effect of the
purchase.

I think the objection is well taken. The respondents must be considered as having agreed to pay the tax for the privilege of holding a year. Their purchase is an admission that the term was worth the sum paid by them. This purchase turns out in evidence not to have been a very dear

one; for the answer asserts (and it must be taken as proof) that had it been left to the bidder next below the respondents, the term would have been extended but for a few months, or at most, one year. Now, can the Court make a new contract for these parties? Shall we say to them, "you were of necessity bound to make this purchase, and we will indemnify you, by reimbursing the sum paid, without taking into account the value of the term which you have purchased and enjoyed?" The respondents have taken the remedy into their own hands. They have purchased, and (as we are to intend) have had the use of the land for a year at their own price; and yet the decree in the Court below allows them the whole sum paid, without abatement. It gives them both the term, and the money which they have paid for it.

The Chancellor puts this on the ground of necessity. I do not see it in this light. I admit there was a necessity of paying off the incumbrance, but not of purchasing under it. On *paying* the assessment, the respondents might have come into the Court of Chancery, and said, "We have been under a legal necessity of paying a senior incumbrancer, in order to save ourselves. Now, upon the equitable principle of substitution, we claim to stand in the place of the corporation, and be refunded from the proceeds of the sale under our decree." There are several cases decided by the Chancellor, which would have sanctioned such a claim. It is recognized in the case of *The Silver Lake Bank v. North*, (4 John. Ch. Rep. 370.) There is a provision in the act under which this assessment was made, which would seem to sanction such a course. The 175th section declares, (2 R. L. 408,) "That if any money so to be assessed, be paid by any person, when, by agreement or by law, the same ought to have been borne and paid by some other person, it shall then be lawful for the person paying, to sue for, and recover the money so paid, with interest and costs, as so much money paid for the use of the person, who ought to have paid the same." In this case, the respondents need not have gone to their action. The law would not do so

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It was not required by legal necessity, though payment might have been.

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idle an act as to turn them round to such a remedy. All parties were before the Court of Chancery upon a matter cognizable there, and the whole would have been a very proper subject of adjustment in that Court.

But the respondents have not chosen to take this remedy. They have suffered the property to be sold : they have themselves purchased and possessed it under the act, and they must abide the bargain which they have made.

Suppose the appellants had filed a cross bill against the respondents, praying an account of the rents and profits during the year. The plain answer would have been : "We are the purchasers of this property, and hold it by a lease from the corporation, for which we have paid an equivalent ; and we are not bound to account. The whole subject has been before the Chancellor, and is disposed of." This would be a conclusive answer.

In granting the prayer of the respondent's bill, we take from the appellants all the benefit of competition at the sale. If the respondents had not purchased, this assessment would have been paid by some other bidder, for a term of two years, at most, according to the answer. Thus the corporation would have been paid : the respondents could not have been materially injured ; and the whole sum would have been saved to the appellants.

I am clear for reversing the decree.

Answer con-
clusive.

SUTHERLAND, J. No replication having been put in to the answer, it is to be considered as true throughout, upon the plain and obvious principle that the respondents, by not filing a replication, and thereby putting the facts contained in the answer in issue, have deprived the appellants of the opportunity to prove them.

Effect of its
being consid-
ered so in this
case.

It is, then, to be taken as an admitted fact in the case, that if the respondents had not become the purchasers at the auction, some other person would have paid the assessment for the use of the premises during two years. This fact is positively asserted in the answer. The annual value of the premises, therefore, is proved to have been between 7 and 800 dollars, at least. In this view of the case admitting the

purchase by the respondents to have been compulsory, and that it was necessary for the preservation of their right, under their mortgage, it would seem to be manifest that they could have no equitable claim upon the appellants for any thing more than the difference between the sum paid by them for the lease for a year, and the actual value of the premises for that term. They purchased for the sole purpose of guarding their rights as mortgagees. They went into possession under that purchase in judgment of law; and there is nothing in the case to show that they did not in fact. They were then mortgagees in possession with an equitable claim, or lien, for the amount which they had been compelled to pay in order to obtain the possession, but unquestionably liable to account for the rents and profits of the mortgaged premises. Under the pleadings and proofs in this case, can the respondents be permitted to say, that the use of the premises for a year was not worth the full amount paid by them? There is no such allegation in their bill. They merely say, "that to prevent a sale of the premises for a long term of years, they were compelled to pay the amount of the assessment, and take a lease of them for a year." Not an allegation or intimation any where in the bill, as to their annual value. The answer states the mode and circumstances of the sale—that it was at public auction—that there were other bidders who would have paid the assessment, for the use of the premises for a few months longer than they were bid off for by the respondents.

I think the respondents, under the circumstances of this case, are concluded from saying that the use of the premises for a year was not worth the amount paid by them.

But it was not necessary for the respondents to pay the assessment, in order to protect their rights as mortgagees. A sale under the assessment did not affect the title to the premises. It gave to the purchaser only a right to the temporary use and enjoyment of them. The mortgagees had still a right to foreclose their mortgage, and to sell the mortgaged premises, subject to the right acquired under the assessment. If the law had directed the assessment to be collected by an absolute sale of the premises, instead of a lease for a term

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Use of premises for a year must be presumed worth what was paid.

But it was not necessary to pay assessment to protect respondent's rights.

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Date
*
S. E. Evon.

of years, the case would have been very different. Then the title would have passed under the sale, and unless the mortgagees became the purchasers, the lien of their mortgage would have been gone. That would have been clearly a compulsory purchase.

Under the circumstances of this case, I cannot but consider the purchase as voluntary, and that the respondents have no equitable claim to be reimbursed the amount of the assessment, thus paid by them, out of the proceeds of the sale of the mortgaged premises. I am accordingly of opinion, that so much of the decree of the Chancellor as directs such reimbursement, should be reversed.

SAVAGE, Ch. J. concurred in the result of these opinions.

For reversing, in part, 20.
For affirming, 5.

A majority of the Court being of this opinion, the following order was entered:

This cause having been argued by counsel, and due consideration had thereon; and it appearing to this Court that the payment of the amount of the assessment upon the mortgaged premises, as stated in the pleadings, and made by the respondents, was not made by necessity, to deliver the mortgaged premises from incumbrance, and for the benefit of all the parties concerned therein; but, on the contrary, that the amount of the said assessment was paid, in pursuance of a purchase at auction of a term in said premises, by reason whereof the payment of the said assessment does not form a just and equitable charge, to be reimbursed out of the proceeds of the sale of the mortgaged premises:

Thereupon, it is ORDERED, ADJUDGED and DECREED, that so much of the decree of his Honor the Chancellor, as directs any money to be paid out of the proceeds of the sale of the mortgaged premises, for the satisfaction and reimbursement of the amount of the said assessment, be reversed; and that the decree, in other respects, be affirmed; and that the proceedings be remitted, &c.

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Dec. 1882.

Rosevelt
v.
Fulton.

NICHOLAS E. ROSEVELT appellant,
against
DALE & WIFE, Executors of ROBERT FULTON, respondents.

Where F. purchased of R. a tract of land on the bank of the Ohio river, R. representing and believing, that it contained a valuable coal mine; and, besides paying to R. \$4400, F. covenanted to pay him an annuity of \$1000 for 20 years; which annuity was to cease, if after the mine was faithfully worked by F., it should not yield a certain quantity of coal, and the land was accordingly conveyed by R. to F.; it turning out, in fact, that there was not such a coal mine as was represented by R.; a perpetual injunction was granted to restrain R. from prosecuting at law for the annuity, though it did not appear that R. had been guilty of fraud.

Held, also, that as there was no such coal mine in the land, as was represented, F. need not work the mine in order to determine the quantity of coal.

Relief can be had in equity against any deed, or contract in writing, founded in mistake:

And this, whether the mistake is set up affirmatively, by bill, or as a defence:

And the mistake may be shown by parol proof.

APPEAL from the Court of Chancery. All the material parts of the pleadings and proofs are stated in the opinions of the Judges; and see, also, 5 John. Ch. Rep. 174, S. C., where the pleadings and the proofs, considered material by the Chancellor in the Court below, are stated together with the decree appealed from, and the reasons of that decree.

Rosevelt, for the appellant said the whole case resolved itself into a question of fact upon which the Chancellor should have awarded an issue. Here was neither fraud nor mistake. The evidence afforded no pretence for the former, and if it gave countenance to the latter, or even established a mistake beyond all doubt, this could not avail the respondent. The contract was executed, and could not be set aside without affirmative evidence of fraud. And he went into a full examination of the evidence in reference to the

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two questions of fraud and mistake ; and to show also that the Chancellor erred in supposing there was not, in fact, a valuable coal mine in existence as supposed by the parties ; that though the mine might lie principally in the river, yet being above tide water, it was no less the subject of private ownership ; and might have been worked to advantage at certain seasons of the year, as the testator of the respondents had agreed, in order to determine its extent and value.

To show that the proprietor of the bank above tide water owns *usque filum aquæ*, he cited Harg. Law Tracts, 5 ; *Palmer v. Mulligan*, (3 Caines' Rep. 319 ;) *Adams v. Pease and another*, (2 Con. Rep. N. S. 484 ;) *The People v. Platt*, (17 John. 210 ;) *Hooker v. Cummings*, (20 id. 99.)

At any rate, the Chancellor should have awarded an issue to try the questions of fraud and mistake.

M. Van Buren, for the respondent said that Fulton's inducement to purchase, was the supposition that the land contained a valuable coal mine. This was presented by Rosevelt in the most imposing point of view. He examined the evidence, and contended that Fulton had been misled by Rosevelt's representations ; and whether this was actual moral fraud, arising from a knowledge that the history which he gave was untrue, or a mistake, it was the same thing in its effect upon the contract. (1 Madd. Ch. 208, and the cases there cited.)

If a man will represent a state of things as within his knowledge, and thereby draws another into a contract, the latter ought not to be holden, if the representation be untrue.

Coal did not exist in the bank to any extent worth naming. If there was a mine, it was in the bed of the river. But it is said the Ohio is private property. This we deny. It is a public highway ; and there are several acts of Congress establishing ports of entry upon it in different places.

It was doubtless competent for the Chancellor to have awarded an issue, had he thought it necessary ; but this is a matter of discretion, like referring a question of law to

the Judges. In only two cases, is he peremptorily required to award an issue. These are upon a question of *devisavit vel non* and adultery ; the former at common law ; the latter by statute. Even in these cases, he may disregard the verdict, or send it to another jury, if he is dissatisfied with the decision of the first. But the appellant did not ask the Chancellor for an issue.

Again, if the cause go to an issue, it must be determined as before the Chancellor, by written depositions of foreign witnesses, taken by commissioners. The object of an issue is to have the benefit of an oral examination of witnesses.

S. Jones, in reply. This agreement is as deliberate an act as the parties can do in the law ; and from which they ought not to be released, unless some substantial cause is shown in the clearest manner. One part of the agreement is to pay the annuity, provided a coal mine is found yielding a given value. There is a special provision as to the mode of testing this fact. This we ask the respondents to follow up, and we will submit peaceably if the result is against us.

The contract has been in part executed, by a conveyance of the land. We have done all which was necessary, on our part, to execute the contract. We are not seeking to enforce any demand, but were proceeding at law to enforce the contract against Fulton's representatives, when we were arrested by an injunction. Is an executed contract to be set aside because there may be scruples about its equity ? Had we come to enforce an executory contract, an appearance of unconscientiousness might have driven us to law ; but there is a wide difference between coming to compel the execution of a contract, and to rescind one which is already executed. It is an axiom, that you cannot set aside the latter unless fraud is clearly shown. This rule is so well known and established, that I should be ashamed to cite authorities in its support. It comports with the plainest rules of common sense, and need only be stated to be acknowledged. There is no pretence for alleging fraud in this case,

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and even if a mistaken representation be sufficient for the respondents, none is established. [Here he examined the evidence as to these points, and contended that Roosevelt's representations were shown to be substantially correct.]

The rule in relation to awarding an issue, as established by the later cases in England, is, that whenever the Chancellor finds there is a material question of fact, about which the witnesses differ, he will always award an issue.

Suit at law.

WOODWORTH, J. The appellant commenced an action in the Supreme Court, against the respondents, to recover the consideration stipulated to be paid for a title to certain lands in the state of Indiana. The contract contains two distinct covenants: the one for the payment of \$4400, for the title—the other for the payment of an annuity of \$1000, for a coal mine supposed to be on the premises.

Prayer of bill.

The bill prays that the appellant may be compelled to surrender the agreement to be cancelled, that it may be declared null and void, as having been obtained by deceit and fraud, and for an injunction to restrain the respondents from proceeding in a suit at law, and for general relief.

Decree

It does not appear from the case, whether an injunction was granted in the action for the purchase money; but in the appellant's points it is stated, that an injunction was issued by one of the Masters in Chancery, and not dissolved by the Chancellor. In the decree no notice is taken of the suit at law. It directs that the appellant be perpetually enjoined from suing or prosecuting any action or suit at law, for the recovery of the annuity, or any part thereof.

There is nothing in the decree relating to the \$4400; and, for aught that appears, there is no impediment in the way of a recovery to that extent. This, I presume, is the cause why the Chancellor does not vacate the contract, but applies the powers of the Court to operate upon the annuity only. In this view, it was proper to leave the title to the land in the representatives of Fulton.

The point.

The question then is, whether the contract respecting the annuity was entered into on the part of Fulton, in conse-

quence of representations, which were either fraudulent or untrue, in point of fact, and founded on mistake.

As it is very evident the inducement of Fulton to contract was a belief in the existence of a valuable coal mine, if it shall appear that he relied on a state of facts disclosed by the appellant, which are found to be untrue, I apprehend it is not material whether the intent was fraudulent, or the representation proceeded from misapprehension or mistake. On the argument, I understood the counsel to say that the contract being executed, it could not be set aside unless for fraud. It will be conceded, that every kind of a mistake is not relievable in equity ; as where the fact, from its nature, was doubtful, or at the time of the agreement equally unknown to both parties : but they are relievable where there is express evidence of the intention of the parties. Thus, in *Gee v. Spencer*, (1 Vern. 32,) a release was set aside by reason of the misapprehension of the party. (18 Vin. 376. *Mildmay v. Hungerford*, 2 Vern. 243. 1 Fon. 106.)

In *Gillespie v. Moon*, (2 John. Ch. 596,) the Chancellor observes, " I have looked into most, if not all of the cases on this branch of equity jurisdiction, and it appears to me to be established, and on great and essential grounds of justice, that relief can be had against any deed or contract in writing, founded in mistake or fraud. The mistake may be shown by parol proof, and relief granted to the injured party, whether he sets up the mistake affirmatively, by bill, or as a defence." Also, in *Bingham v. Bingham*, (1 Ves. 127,) an agreement was made for the sale of an estate. The plaintiff was relieved on the ground of mistake. It was held, that although no fraud appeared, and the defendant apprehended he had a right, yet there was a plain mistake, such as the Court was warranted to relieve against, and not suffer the defendant to run away with the money, in consideration of the sale of an estate to which he had no right. It may be laid down as a general proposition, that to rectify mistakes is the peculiar province of a Court of Chancery. (1 Ves. Jun. 445.) Indeed, a contrary doctrine would strike at the root of fair dealing, if the party making a false representation might allege it was not done fraudulently. To

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Intent need
not be fraudu-
lent.

Mistake will
set aside a-
greement.

This may be
shown by pa-
rol.

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The contract
and evidence.

Obligation to
arbitrate inap-
plicable.

Fulton it was immaterial whether the appellant acted fraud-
ulently or not—the injury to him is in either case the same.

It is enough that he put confidence in the statement, and
relying on its truth, consented to be bound. ✓, , ,

[The contract recites, that the appellant did discover a coal
mine, on the bank of the Ohio river, which is embraced
within a tract of land, particularly described, containing
1040 acres. It prescribes the manner in which Fulton was
to be relieved from the payment of the annuity, should the
mine become exhausted, after faithfully and scientifically
working the same, according to the plan and manner of work-
ing coal mines in Europe. In the argument it was con-
tended, that relief must be sought under this provision. The
answer to the objection is, that the clause has reference to a
different state of facts. It takes for granted, that the con-
tract cannot be invalidated by reason of a fraud, or any oth-
er equitable ground, existing at the time of its inception. It
does not relate to a deficiency of coal, at the commence-
ment of the operations, but is intended to guard and protect
the party against a future failure. That contingency has not
happened. The respondents say, “We are not bound to in-
cur great and unnecessary expense in working the mine,
without the prospect of remuneration. We are absolved from
this, inasmuch as there is no coal mine on the bank of the
river, answering the description given by the appellant.” If
this be true, it must be evident that the clause relied on has
nothing to do with the question now before the Court. The
respondents seek relief on distinct grounds of equity. They
allege that they have been deceived, and drawn in to make
the contract, by false representations. If they have succeed-
ed in this respect, the contract must necessarily fall, so far
as regards the annuity. The cause then resolves itself into
a question of fact—Is there a coal mine on the bank of the
river, within the boundaries of the land as described? and
if so, was it fairly and truly represented in the appellant’s
letter of the 23d Nov. 1813?

Description
which led to
contract.

The description is certainly given in glowing colors. I think
a purchaser would not be considered very sanguine, in believ-
ing the acquisition to be a mine of wealth. The appellant

says, "When I first discovered the mine, after removing a few inches of earth, I did, with the aid of a hatchet, and a few wooden wedges, break or split off squares of coal as large as two men could handle." He threw into his boat a few chaldrons. At Natchez he sold 30 or 40 bushels that remained. In his second descent he had no occasion to take coal out of the mine, as he found, already raised, many thousands of bushels, ready to be carried off by flats, some of which were then on the spot. At New Orleans he found several flats, loaded with coal for sale, which he ascertained to have come from the same mine; that the coal, when the water was up, is overflowed, as all the bottom lands are on the margin of the Ohio; but by wheeling it a few yards out of the mine, it may be put on high grounds, accessible at all stages of the water. If this description is not substantially supported, it would be iniquitous to compel the respondents to pay the consideration. I think this presents a case in which, if there was no mistake or fraud, there would be no difficulty in obtaining proof. A coal mine so accessible, so productive, in the midst of inhabitants, cannot be an obscure object. Its existence is susceptible of the most satisfactory proof. Numbers must have been employed in raising the immense quantities of coal stated to have been found on the surface, as well as many persons to transport it, as an article of commerce. Something more than scanty proof of a coal mine, bearing a resemblance to the original, is justly expected. The fact, alone, that conclusive proof is not exhibited, is, in the absence of explanation, a circumstance unfavorable to the the appellant's claim, and attaches suspicion on the original representation. The respondent's witnesses are acquainted with the Ohio river, 30 or 40 miles above Anderson's Creek. They speak of but one coal mine.

James McDonald, Jun., says he is acquainted with the tract of land mentioned—he lives five miles from it—that there is a bank of coal in the bed of the river—in some seasons it is covered throughout the year with water; and is always covered, except in very low water—the water rises from 35 to 40 feet—the coal mine could not be worked, but at very great expense.

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If a mine, it
was easy to
prove it.

Proof
M'Donald's
evidence

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John Bristow lives near the land. His testimony, in substance, concurs with that of McDonald.

It is scarcely credible, if there had been a valuable coal mine on the bank, it should be unknown to these witnesses; both of whom have assisted in raising coal from the bed of the river.

Rector's evidence.

Elias Rector, a witness for the appellant, says he went down the river in 1809. He believes there is a coal mine there—that he and the appellant, with other men, did take out of the mine some of the coal—that the coal was not found in the bed of the river, nor was it a deposit. Nothing is said about the quantity of coal taken, or with what ease it was obtained. The smallest quantity would satisfy the words of the deposition. Why not support the description of the appellant, if it could be done consistently with truth? It is very clear to my mind, that the representation given by Rector would not have been deemed satisfactory to Fulton, or any other purchaser. It has but little resemblance to the letter of the appellant.

White's evidence.

Thomas C. White, another witness for the appellant, says he has been in the state of Indiana, and knows the land—he has passed over it twice in travelling, for the purpose of viewing the tracts, at the request of the appellant—he discovered a bed of coal, on which men were at work—it appeared to extend, on the surface of the bank, for about 30 or 40 yards—it was evident it constituted a part of the land—he cannot say how much coal may be produced from the land, but from the circumstance of there being much coal in the neighborhood, and from the appearance and extent of the bed, he supposed it would yield a great quantity.

From the statement of this witness, I think it may be inferred, that he was not a resident. He merely says, he has been in Indiana, and was sent by the appellant to view the tract. The question again forcibly returns, why not examine some of the persons who had worked the mine, and who knew something about the large quantity of coal that had been sent down the river? It can scarcely be presumed they had all disappeared. White, indeed, says he was told that a steam-boat had been seen at the bank taking coal on board.

which had been dug and placed on the bank; but this is hearsay, and no evidence.

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Fulton.

Latrobe's ev-
dence.

I do not consider Latrobe's testimony material, as to the representations upon which the contract was made. He says that Fulton intimated, that possibly the situation of the mine might be such as to render it impracticable to work it, except when the waters of the Ohio were low. The witness suggested that shafts might be sunk at some distance from the river, to obviate the difficulty. Admitting that Fulton was apprised of the great rise of the river, the material inquiry is, was the mine on the bank, and if so, does the proof warrant the description given by the appellant? I think it does not. In my opinion, the testimony of the respondents greatly preponderates, and fully supports the Chancellor's decree.

Some suggestions were made as to awarding an issue to try the fact I have been considering. Wherever there are doubts regarding facts, an issue is proper; but the Chancellor has a right to take upon himself the decision of every fact put in issue upon the record. The propriety of an order for an issue, is a question depending on the nature and force of the testimony. Where, from the nature of the question, or from the testimony already given, it appears that farther light may be obtained, it would be proper to require further proof; but if the evidence be satisfactory, or decisive in favor of either party, the rights of such party ought not again to be hazarded before another tribunal. (1 Mad. 363. 1 John. Cas. 500.)

When issue
to be awarded

I am of opinion, that the decree of the Chancellor be affirmed.



SUTHERLAND, J. concurred.

BOWKER, BOWNE, BRONSON, CLARK, DUDLEY, EARLE, GREEN, HATHAWAY, HUNTER, KING, LEFFERTS, MALLORY, M'INTYRE, OGDEN, REDFIELD, STRANHAM, and THORN, *Senators*, concurred.

SAVAGE, Ch. Justice, (after stating the testimony of the witnesses.) I cannot view this transaction in the same light with the late Chancellor. If there ever was a fraudulent in-

No evidence
of fraud.
The result
of the proof
stated.

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Rosevelt
v.
Fulton.

tent in the mind of the appellant, at what time did it originate? In 1809, he first discovered what he supposed to be an extensive bed of coal; he, with Rector, purchased the land: in 1811, he became the owner of the whole, and expressed an intention of working the mine. At this time, Fulton knew nothing of it: two years elapsed before he had any knowledge of its existence; and when the fact was communicated to him, there was no offer to sell; nor does it appear that such an offer was ever made, until he applied to make the purchase. When this application was made, the appellant freely communicated in writing the facts which induced him to place great value upon the mine; and he referred Fulton to Baker, an engineer, then in the employment of Fulton himself, for the truth of his representations. Baker was applied to by Fulton, and confirmed their truth.

Further: The facts stated as to the discovery of the mine, the procuring coal with great facility, and the purchase of the land, are fully confirmed by Rector. The fact of the appellant's taking a large quantity of coal on his second passage down the Ohio, is admitted; but it is alleged that it had been fraudulently placed there. This allegation is totally unsupported. White proves the existence of a coal mine of considerable magnitude; and it is not positively disproved. The witnesses, M'Donald and Bristow, knew of no coal mine in that vicinity, except one in the bed of the river; but they do not state that they have ever been on the land to look for it.

Fulton was
to work the
mine

But did not.

By the contract, Fulton was to have commenced working the mine in June, 1814, or as soon as convenient thereafter; and if the coal failed, then the salary or annuity was to cease. It does not appear that Fulton ever took any measures to fulfil this part of the contract, or that any measures for this purpose were adopted by his representative after his death.

There should
be full and
positive proof
of fraud or
mistake.

This contract was deliberately entered into, and ought not to be set aside, either for fraud, or mistake, unless upon full and positive proof. In my judgment, the proof on the part of the respondents does not at all support the allega-

tion of fraud, and the proof on the part of the appellant substantially supports every representation made by him.

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I am of opinion, therefore, that the decree of his Honor the Chancellor, perpetually enjoining the appellant from prosecuting at law, for the recovery of the annuity, and compelling him to pay costs, should be reversed.

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v.
Neilson

The existence of the coal mine, being the only point in controversy, which admits of doubt; this being strenuously asserted on one side, and as strenuously denied on the other; as the proofs are conflicting in relation to it, and as the decision of facts properly belongs to a jury; and both parties aver that they have further testimony on that subject, not now before the Court, I am further of opinion, that the Chancellor should be directed to award an issue to determine that fact.

Should have
been an issue

BURT, CRAMER, LYNDE, WHEELER, and WOOSTER,
Senators, concurred.

A majority of the Court being of opinion, that the decree should be affirmed: It was thereupon ORDERED, ADJUDGED and DECREED, that the decree of the Court of Chancery, made in this cause, be affirmed, with costs to be taxed, and that the record, &c.

For affirm-
ance, 19. For
reversal, 6.

WILLIAM M'DONALD, FRANKLIN LIVINGSTON, WILLIAM
GRIFFETH and SETH EDDY, appellants,
against
JOHN NEILSON, respondent.

A party charged as combining with others, in a fraud against which relief is sought, and who, therefore, is made a defendant, but against whom no particular relief is prayed, may, though liable for costs, be a witness for his co-defendants.

He comes within the exception to the general rule excluding a witness on account of interest, viz. that where the interest is contingent or uncertain, the witness is nevertheless competent, and the objection shall be confined to his credibility.

Where a party, whose personal property has been seized under an execution against him, and a sale of it forced with great rigor and oppression, and at enormous sacrifice, by the deputy sheriff, acting in concert with

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v.
Neillson.

the creditor, who is the chief bidder at the sale, is induced, in order to avoid the sacrifice of the whole property, to yield to the demands of the creditor, and to give him a bond and mortgage for a large sum of money, so as to cover not only the amount of the execution, but also debts due from a son of the debtor who is insolvent, the sale will be declared oppressive and illegal by a court of equity; and the bond and mortgage, as having been oppressively and illegally obtained, will be directed to stand as security for the amount only which is due on the execution, with interest and costs; and, on payment of that amount, to be delivered up and cancelled.

But where, in such case, the creditor has other demands against the debtor, though they could be enforced in a court of equity only, the bond and mortgage shall also stand as security for them.

And if it appear, moreover, that the bond and mortgage were executed upon full and adequate consideration, and are on the whole reasonable, the court will not interfere; especially where the debtor has delayed all objection to the security so long that the creditor cannot be reinstated in his original rights.

A party asking equity must do equity.

A sheriff is not bound to obey the instructions of a party, in executing a *fi. fa.* if he sees it will produce a great sacrifice of property;

But should rather postpone the sale; especially where the plaintiff cannot sustain any injury by the delay.

He should take all necessary and all lawful measures to secure the sum he is directed to levy;

But as to the time, place and manner of sale, he is vested with a sound discretion.

A legal act will always be presumed to have been done for a legal purpose, unless the contrary is made to appear by positive proof, or the strongest circumstantial evidence. Per Sutherland, J.

But when it does appear to have been done for an illegal purpose, a court of equity will restrict its operation to the object which might legally have been accomplished by it. Per Sutherland, J.

Execution—The cases which require regularity, and fairness in a sale, under, cited by respondent's counsel.

Set-off—Authorities, limiting the right of, to cases of mutual debts, and excluding the right to set off torts and damages upon a special agreement, cited by counsel for the respondent, with those which show the rule to be the same in equity as at law.

To constitute a right of set-off in equity, there must be mutual debts between the same parties, in their own right, of the same kind or quality, and be clearly ascertained or liquidated. Per Woodworth, J.

A court of equity follows the same rule as a court of law, in respect to set-off. Per Woodworth, J.

Every material allegation should be put in issue by the pleadings. Per Woodworth, J.

Consideration—The voluntary restoration of that which the law will compel a man to restore, not a sufficient consideration for a contract. Per Sutherland, J.

Consideration—Agreement of a son that the father shall deduct a certain part from his portion, is no sufficient consideration. Per Sutherland, J.

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Duty of officers in executing process—The law will make the most liberal intendment in favor of its ministerial officers, but will not permit them to resort to the *ultima ratio*, when the legitimate objects, which it is their duty to effect, can be accomplished by milder means. Per Sutherland, J.

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Sheriff should obey a *fi. fa.* in having money at return day—should not show favor nor give unreasonable delay, nor be guilty of oppression, nor use more severity than is necessary. Per Savage, Ch. J.

Chancery may relieve against deeds or judgments obtained by fraud or imposition; or where, if regularly obtained, there are circumstances of extraordinary hardship, or great inadequacy of consideration; but the party asking equity must do equity; and he must not, on his part, have been guilty of fraud and chicanery. The hardship should not be the consequence of his own misconduct; nor should he delay coming for relief, till the situation of the parties is so far changed that they cannot be reinstated in their original rights. Per Savage, Ch. J.

APPEAL from the Court of Chancery. The respondent filed his bill in the Court below against the appellants. One object of the bill was to set aside a bond and mortgage, for \$25,000, executed by the respondent to M'Donald, one of the appellants, upon the ground that these securities had been executed to avoid a forced, oppressive and illegal sale of the respondent's property, which, as he alleged in his bill, had been conducted by M'Donald, in concert with the other appellants under a *fi. fa.* issued against the respondents.

The bill stated, and the answer admitted, that in August term, 1819, the appellants M'Donald & Livingston, obtained a judgment in the Supreme Court, against the respondent for \$480 83, upon which a *fi. fa.* issued in November of the same year, under which the appellant, Griffith, a Deputy Sheriff, by the direction of M'Donald, was proceeding in a sale of the respondent's property, at a great sacrifice, to avoid which, the securities in question were executed. The appellant, M'Donald, set up in his answer the following, among other matters of defence:

That in May, 1818, he recovered a judgment of \$1645 33, against John Neilson, jun., a son of the respondent, upon a promissory note made by him, the 14th March, 1816, for \$1393 82, payable to one Jacob Boyce, or order, and en-

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dorsed by him for the accommodation of J. Neilson, jun., and received by M'Donald, in part pay for a debt due from J. Neilson, jun., for goods before that time sold by M'Donald to him ; that M'Donald sued out a *fi. fa.* under which he and the appellant, Livingston, levied upon the goods and chattels of John Neilson, jun., to the value of about 800 or 1000 dollars, which the respondent claimed as his own, and caused to be replevied ; that the replevin suit was tried, in May, 1819. On the trial the respondent claimed the goods by a purchase from D. Newland, who, it appeared, bid them off at a Sheriff's sale, on an execution in favor of Rockwell and Stebbins, against J. Neilson, jun. That this Sheriff's sale, was on the 27th January, 1817 ; that the sales to Newland were of the same articles in question in the replevin suit. The bids amounted to \$353 33, which the respondent paid to Newland, who relinquished his bids to the respondent. The respondent also paid the balance of the execution due to R. & S. of \$112 38 ; that most of the articles sold, were suffered to remain in John Neilson, jun.'s possession.

That the appellants M'Donald and Livingston, in their defence of the replevin suit, proved the judgment, execution and levy, in favor of M'Donald, as before stated ; and that J. Neilson, jun., had continued to use most part of the property sold at the Sheriff's sale, and purchased by Newland and sold by him to the respondent ; that a bureau and trunk, containing a considerable quantity of dry goods, were sold without the contents being exposed at the time of sale ; and when the replevy was made, the respondent appeared ignorant of their contents.

That the appellants, M'D. & L., farther proved, that J. Neilson, jun., in 1816, had sent a raft to New York, worth \$1000 or \$1200, which he had contracted in writing to deliver to M'D., at New York, in part payment of the debt due to him ; that the raft had been withheld from him by the respondent, who had received the avails thereof ; that an action of trover had been brought by M'D., against one S. Hewitt, under whose care the raft had been sent to New-York, which was tried at the Albany Circuit, in Oct., 1817 ;

that J. Neilson, jun. was a witness for Hewitt, upon that trial; and swore that his father, the respondent, had received the avails of the raft, and was to pay therewith certain debts due from J. Neilson, jun. among which was the debt due to R. & S. on their judgment; that it was also proved, that the value of all the goods seized by the appellant, and Livingston as Deputy, was about \$601, being less than the full value, which M'D. was unable to prove; that the value of that part of the goods seized, not named in the pleadings in the replevin suit, was 235 dollars 69 cents, leaving as the value of the goods and chattels, not named in the pleadings, \$365 31, for which, together with the interest, making, in the whole, \$394 56, as damages, the jury rendered a verdict in favor of the appellants, M'D. & L. against the respondent; the final judgment was rendered in August, 1819, for \$480 83, damages and costs: that on the 10th Nov., 1819, M'D. delivered a *fi. fa.* upon this judgment, to Livingston, who, on the 13th Nov. seized the personal property of the respondent, and advertised the same for sale on the 22d Nov.; that the proceedings upon this sale resulted in the bond and mortgage, which the respondent sought by his bill to set aside.

M'D. farther answered, that as a consideration of this bond and mortgage, not only the bids made at the sale were relinquished, but that he assigned to the respondent the judgment against his son, J. Neilson, jun. and transferred to the respondent the note endorsed by J. Boyce, on which the judgment against J. Neilson, jun. had been obtained, and another note against J. Neilson, jun. also endorsed by Boyce for 800 dollars, and discharged the judgment in the replevin suit. He admitted, however, that Boyce was insolvent. He stated that his debt against J. Neilson, jun. was due for goods sold to him by M'D. in the fall of 1815, to the amount of about \$2100.

The answer admitted the rigorous proceedings at the sale by M'D. and the Deputy (as they are hereinafter stated in the opinions of the Judges,) and averred that these proceedings were with a view of making advantageous purchases, in the hope of thereby saving a portion of the large

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amount justly due M'D. from J. Neilson. jun. M'D. there and still believing, that the respondent had fraudulently combined with his son, J. Neilson, jun. to prevent him from collecting the same ; and that the respondent had, in the prosecution of such fraudulent combination, subjected him to great trouble and expense in law suits ; and conceiving that the respondent was morally bound to refund to M'D. the avails of the raft and other property, which he (the respondent) had fraudulently got into his possession, as before set forth, and which M'D. would, otherwise, have obtained in part payment of his demand.

A replication was put in, and proofs taken in the Court below. The evidence which relates to that part of the answer above set forth, is stated hereafter in the opinion of the Chief Justice.

The other facts, material to the points raised by the counsel, and determined by the Court, will be found in the report of this case as decided in the Court below, (6 John. Ch. Rep. 201 ;) and a summary of the same facts is also given by the Judges, who delivered opinions here.

For the decree, vide 6 John. Ch. Rep. 212, 213.

B. F. Butler, for the appellants, contended that the decree was erroneous, and ought to be reversed, for the following, among other reasons :

1. The sale of the respondent's personal property, made by virtue of the execution in favor of the appellants William M'Donald and Franklin Livingston, was legally conducted ; there is no evidence of any fraudulent combination on the part of the defendants, nor did the Sheriff violate his duty.

2. If the Sheriff's sale was improperly conducted, and the bond, mortgage and note, extorted by means thereof, the respondent should have applied to the Supreme Court, out of which the execution issued, for relief.

3. Even admitting the Sheriff's sale to have been improperly conducted, the bond and mortgage executed by the respondent to the appellant, William M'Donald, and the note made by him to the appellant, Seth Eddy, were not thereby invalidated.

4 The bond and mortgage to William M'Donald, and the note to Seth Eddy, were executed by the respondent voluntarily, with full knowledge of his rights, and upon good consideration, and there is no ground upon which the Court of Chancery could properly interfere, with regard to either of those securities, and especially with the note to Eddy.

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5. The respondent having fraudulently combined and colluded with his son, John Neilson, jun., for the purpose of defeating the collection of the just demands of the appellant, William M'Donald, was not entitled, in this case, to the interposition of the extraordinary powers of the Court of Chancery.

6. By his silence and delay, the respondent affirmed the settlement made by the appellants, William M'Donald and Seth Eddy, and cannot now be permitted to impeach the same.

7. If the respondent was entitled to be relieved from the bond and mortgage, he ought not only to have been required to pay the amount of damages, costs, and Sheriff's fees, upon the judgment against him, but he should have been decreed to deliver up and cancel the release of all demands executed by the appellant, William M'Donald, and to account, before a master, for all the property of John Neilson, jun., to which the appellant, William M'Donald, was equitably entitled, and which came to the respondent's hands with notice of such equitable interest.

8. The bill should have been dismissed, with costs, as to all the defendants.

As to the admissibility of Griffeth and Livingston, as witnesses, in addition to the cases cited by the Chancellor, (6 John. Ch. Rep. 204, 5,) I refer to *Fenton v. Hughes*,^(a) *Dummer v. Corporation of Chippenham*,^(b) and *Whitworth v. Davis*.^(c) There is some inconsistency in saying with the Chancellor, that they are competent, but their credibility is shaken because they are defendants. Their liability is contingent. The reason given by the Chancellor, against their credibility, presupposes that any disinterested

(a) 7 Ves. 287

(b) 14 id. 251

(c) 1 Ves. & Bea. 550

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person may be made a party, so as, at least, to affect his credibility. It is time that this question should be settled. As a defendant, without interest, may demur, if he answer and go to a hearing, he should be considered equally indifferent.

1. The Chancellor considers the sale illegal, because it was *oppressive and conducted by concert*; and it is complained of as oppressive, because there was a refusal to postpone. The Chancellor cites no authority to show that it was the Sheriff's duty to do this, nor does he attempt to enforce the obligation of M'Donald or the Sheriff, to exercise their discretion in favor of an adjournment, except from the fact of security having been offered. We do not deny that an adjournment of the sale would have been humane and liberal: but the question is one of strict legal right. It was proper for the Sheriff to obey the direction of the party. Was he or the deputy bound to adjourn? or should the latter have violated his instructions? The usual practice is for officers to pursue the course marked out by the party for whom the execution is conducted. This course is generally the safest, because it is at the peril of the party; and, as observed by the Chancellor, he is liable for the abuse. No doubt the deputy pursued the ordinary course. How are you to regulate the obligation to postpone sales of property? It must, of necessity, depend upon circumstances, and is not reducible to any general rule. For the sake of certainty, no rule should be established on the subject.

But the Chancellor objects to the demand of specie—that it was sudden, and not heard of till the commencement of the sale. Was this unlawful? The Chancellor seems to suppose so; and yet no argument is necessary to show that specie may always be exacted at a Sheriff's sale; and, on being required, the deputy was bound to exact it. True, it was rigorous. It produced the effect (and was calculated to produce it,) of lessening the bids. The motive might have been to produce this very result; but if the act was sanctioned by law, the motive will not render it illegal. In *Bray v. ———*, (d) a tender of bank notes, for rent, was made, but

(d) 1 Mad. Ch. old ed. 30. MSS. in Ar. ed. 1817, it is p. 29.

declined through pique, and a distress made; and, though coin was scarce, relief by injunction was denied.

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It must be conceded, that the act was legal, *per se*; yet, no doubt, our motives will be assailed, in defiance of the language of authority. Under the circumstances, we insist that M'Donald was fully justified in his course, not only in point of law, but morality. It compelled the respondent to disgorge his ill-gotten gain by practices against M'Donald's rights. He openly avows his motives in the answer. He appears not in the character of an oppressor, usurer, or colluder; but, actuated by a sense of the wrongs he had received, he comes in vindication of a legal course taken to indemnify himself against the injury done him by the respondent. No man in the community would have done less.

Reliance is placed, by the Chancellor, on the sacrifice of property; but mere inadequacy of price is not sufficient ground for setting aside a sale. This is the rule even in regard to voluntary sales; and it is more emphatically so in relation to forced ones. The sacrifice was not greater, in this case, than is usual in sales upon execution, where the most ample time is allowed. A Sheriff is not authorized to take security. If he does so, it is at the peril of answering for the goods.

2. The defendants deny all combination—all concert and understanding. As to this, we have the separate denial of four defendants. The proof should be most overwhelming to do away an answer thus fortified. If there was combination, the defendants cannot escape the imputation of perjury. The Chancellor relies upon M'Donald's admission, that he required payment in specie with a view of making advantageous purchases, in the hope of thus saving a portion of the amount due from John Neilson, jun. the son of the respondent. But the answer of one defendant is not evidence against another; and if it were, the admission cannot be brought to bear upon the question of combination. It relates merely to M'Donald's own private motives.

It is alleged that the combination was to prevent competition; but M'Donald denies all fraud. He fully explains

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the reasons of his conduct. We cheerfully admit that he and he *alone*, is reponsible for every thing done at the sale. But it must rest with him only.

As to the other defendants, the only evidence of combination is, that they surrendered the property purchased; but Eddy refused to do this, for his own reasons, until the respondent had secured him for the debt due from his son. Eddy denies all combination; yet, says the Chancellor, "he was there with gold in his pocket;" and a circumstance, not inconsistent with the most perfect innocence, is made to overturn the solemn denial contained in his answer.

The hardship of the case is not an objection at law, or in equity. If you allow this consideration to prevail, what limits can you prescribe to the rule, which shall save it from the most pernicious consequences? It must be applied by the arbitrary views of men, and rest upon the mere discretion of different Chancellors; and no one can advise whether the rights of the party are secured by law.

If the sale was legal, there is no doubt that the bond and mortgage, and the note to Eddy, were valid. The purchasers, as the consideration for these instruments, relinquished a valid title to property worth \$1900. To this amount, at any rate, the instruments are good.

But suppose the sale voidable, yet we insist the mortgage should be sustained. We have to regret, that our points upon this head were dismissed by the Chancellor, with a passing remark, and evidently without undergoing any thing like a serious examination. Equity will not interfere and set aside a specialty, an instrument of a very solemn nature in the eye of the law, upon light or doubtful causes. This is a well settled rule, from which a Court of Chancery should never depart. It is not likely that the mortgage would ever have been thought of by M'Donald, had not the respondent proposed it to him. He did not seek this arrangement, probably supposing that the money would be paid on his arrival at the place of sale. His sole object, on finding the respondent unprepared, was to make advantageous purchases. Eddy had the same object in view, in reference to his own interests; and, whatever may be the complexion of this affair

in relation to M'Donald and Griffeth, it is perfectly unexceptionable so far as Eddy is concerned. If there was any haste and coercion, it was not on the part of the appellants, but is imputable solely to the respondent's own friends and advisers. The rights of the appellants grew out of the law, which the respondent was bound to know. He acted with his eyes legally open; and no doubt he perfectly understood his rights, for his counsel, Richard M. Livingston, was present, advising, assisting, and witnessing, the very paper which the respondent is now attempting to impeach. Can such a paper be set aside, without the clearest proof that Livingston acted fraudulently and collusively? Securities executed even by a prisoner, in close confinement, are holden valid, when done upon the deliberate advice of counsel.

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The mortgage was executed upon a full and valuable consideration. This consideration consisted of five different subjects, 1. The relinquishment of property purchased at the sale. 2. A release of the balance due upon the *replevin* judgment. 3. The assignment of the debt due from the son of the respondent, upon the judgment of \$1600, and the note of \$800 endorsed by Boyce. 4. A release of all demands against the son. 5. And a release of all demands against the respondent.

Here, then, the transaction was not only lawful in itself, but rested upon the most ample consideration. This clearly distinguishes the case from those cited by the Chancellor, bottomed upon inadequacy of consideration. Had the mortgage been voluntary, no question could have arisen. The consideration of releasing and quieting controversies between the parties would have been enough, *per se*, to have sustained the proceeding.

It is founded not only upon the considerations we have mentioned but another is added. We find it resulting in a family arrangement, by which the respondent is to deduct what he pays for his son, from the share which the latter expected in his father's estate. The simple discharge of the debt due from the son, was a sufficient consideration ;(e)

(e) Com. Dig. Action on the Case upon Assumpsit, (B. 3.)

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and the Court of Chancery would have carried the arrangement into effect, as an advancement to the son, after Neilson's death. Thus the contest is with John Neilson, jun. the real debtor. We stand in the light of a fair creditor, having obtained a legal advantage; and, in such a case, tho' the equity be equal, Chancery will not strip us of our security, nor scrutinize closely the manner in which it was obtained. But the equity is not equal. It is all on our side. Our claim is good, as a matter of abstract justice; and, even if the advantage has been obtained unfairly, equity will not deprive us of it.(f) It is true, the case which we cite from Vernon, is since provided for by a clause in the English bankrupt law; but the principle is not impaired, and, with the case itself, it is retained in our system. Thus the lips of this respondent and his son should be closed, though the rigid rules of law might not have put the matter in the same shape as that in which the parties have placed it.

At any rate, the respondent should account for the avails of the raft which was sold by an executory assignment from the son to M'Donald, but in the recovery of which the latter was defeated by the respondent, upon the technical objection that it had not been delivered. He pocketed the avails, with the avowed intent of defeating M'Donald in his attempt to recover the debt of his son.(g) A judgment against the son was purchased in by these avails, a sham sale upon execution follows, still farther to defraud us of our debt, and the *replevin* suit is the consequence. By these operations another successful fraud was practised upon us.(h)

He who comes to ask equity must do equity. He must come with clean hands.(i) In 2 Cas. in Ch. 15, it is said, "Iniquity takes away equity," and in the case of *Wardour et*

(f) *Small v. Brackley*, 2 Vern. 602. *Sir John Fagg's case*, 1 Eq. Cas. Abr. 354. *Stapleton v. Stapleton*, 1 Atk. 10. *Pullen v. Ready*, 2 id. 591. *Stephens v. Bateman*, 1 Br. Ch. Rep. 25.

(g) For the facts in relation to this, see the introduction to the opinion of the Ch. Justice, post, and vid. *M'Donald v. Hewit*, 15 John. 348, for the ground taken at law.

(h) For particulars, see also post, the introduction to the opinion of the Ch. Justice.

(i) *Cadman v. Horner*, 18 Ves. jun. 11.

ux. v. Beresford et ux.(j) the defendant had entered a bundle of papers relating to the plaintiff's demand, which was entirely distinct from that of the defendant; and for this fraud the Court disallowed the whole of the defendant's demand to £2300, though it was fully proved, and though he swore that he had produced all the papers. The same rule prevails at law.(k) So, misrepresentation disqualifies a person to ask for relief.(l) This is the uniform language of the books, from the earliest history of the Court of Chancery to this day. We ask its application to the present case, if the Court are satisfied that here has been iniquity on the part of Neilson.

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(j) 1 Vern
452.

(k) Vin. Ab.
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1. *Goedale v.*
Wiatt, Goldsb.
179, per Pop-
ham, J.

(l) *Cadman*
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Again : where both parties are equally guilty, the case of the defendant is to be preferred. He is in possession. At most, we have stretched the law in order to avoid the effect of a gross imposition upon us. Our offence is no more than the having opposed force to the devices and machinations of fraud. Force, in itself, cannot be successfully vindicated upon any ground; but where it has resulted in justice, that justice which is administered by a Court of Equity, should leave the parties where it finds them—to their legal rights. There may be extreme cases, like that of Hercules and Cacus, the former of whom was celebrated by the bard of Mantua, for having relieved mankind from depredation and robbery, by the forcible destruction of the latter.

We call for the application of those rules of a Court of Equity, with which the books abound, giving assurances of protection to the holder of legal rights, though they may not have been obtained with perfect fairness, till the antagonist from whom they have been wrested shall do equity on his part. There never was a case in which they could more properly be applied. We call upon this Court to pronounce whether these maxims are to encumber our books, as a dead letter, or be applied to their legitimate purposes—whether they are merely

“To keep the word of promise to the ear,
But break it to the hope.”

Again : the respondent was perfectly silent, and delayed his application for redress till his son was discharged under

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(m) 1 Madd.
Ch. 215, old
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the insolvent act, thereby producing a material change in our rights. The objection of delay is sufficient. No positive act of dereliction is necessary to defeat the claim. We can never be reinstated in our rights, in consequence of the delay and insolvency; and the Chancellor ought not to have interfered to set aside the mortgage, without being able to place the parties where they stood originally. (m) The 1 Madd. Ch. 215, lays down this rule, and illustrates it by a case arising upon marriage articles.

We also have a right to complain, that the respondent was not compelled to deliver up the release of all demands which M'Donald executed. We were not only bound, by the decree, to give up the bond and mortgage, but the release was suffered to remain; and we are thus deprived of all our original rights. Should we pursue the respondent, at law or in equity, the release may be set up as a defence. So as to the son. He, too, was discharged by the release. Nor do I see how the latter release can be avoided by this proceeding. The son is not a party, and cannot be affected by the decree.

Another objection is, that the respondent was not required to account for the property of which we were defrauded by his management in relation to the raft, and the *replevin* suit. We had a claim for this, which was discharged by the arrangement. This is rejected by the Chancellor, upon the ground that it could not legally be *set off*; and he tells us that, "in the case of spoliation, under the Roman law, no compensation was allowed to be opposed against a demand for restitution, according to the maxim of the civil, and which is that of the common law; *spoliatus ante omnia restituendus*, (Pothier Trait. des ob. s. 589; 2 Inst. 714.)" He does not quote Pothier with the proper limitation. That author applies the maxim to cases of criminal plunder, and Lord Coke, in 2 Inst. applies it in the same way. It is there made to bear upon a case of robbery. But the maxim has no force in a Court of Equity. There he who comes for equity must do equity. As the Chancellor applies the maxim, he has violated it himself, in this very decree; for he allows us to retain our mortgage as to the *replevin* judgment.

The only difference between us is in the extent of the allowance. He confines it to the judgment. We wish it to embrace the balance of goods in the *replevin* suit, together with the avails of the raft. We go upon the maxim, that he who seeks equity must do equity ; a rule which applies even where the complainant comes into a Court of Chancery to avoid a legal advantage fraudulently obtained.⁽ⁿ⁾ Take the cases of usury. Though it be illegal to exact a mortgage, covenant, or promise, for its payment, yet the Chancellor never suffers the party to avoid the security, on a bill filed, till he has paid what is justly due, a case strongly analagous to the present. I also refer the Court to *Bates v. Graves*, (2 Ves. Jun. 294, 5 ;) and *Ld. Cranston v. Johnston*, (5 Ves. Jun. 277.) The latter is a very strong case of surprise and severity, in a legal proceeding, by which a large estate of the complainant was divested, being sold to satisfy a debt of small comparative value ; yet the sale was considered a security, and extended to protect whatever was justly due to the defendant. (3 Ves. Jun. 170, S. C.)

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(n) *Payne v. Dudley*, 1 Wash. Rep. 196 and 199.

Van Vechten & Henry, contra, contended that the decree should be affirmed—

1. Because the mortgage and bond to the appellant, William M'Donald, and the promissory note to the appellant, Seth Eddy, set forth in the pleadings, were extorted from the respondent, by a fraudulent, oppressive, and illegal sale of his personal property, under color of legal process.

2. Because the appellants concluded and combined together, in a fraudulent manner, at the sale, to effect such extortion.

3. Because the whole of the appellants' proceedings at the sale manifest a fraudulent and collusive determination to coerce the respondent, by a wanton sacrifice of all his personal property, to give the mortgage, bond and promissory note, in order to avert such sacrifice.

4. That Franklin Livingston and William Griffeth are incompetent witnesses, and that their depositions should have been suppressed.

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The statement of the appellants' case, by their own counsel, shows, a most unwarrantable use of a legal execution, to enforce a claim foreign to the object of it. By an undue influence over the officer, M'Donald buys about 2000 dollars worth of property for about \$300, under pretence of securing a debt with which the respondent had nothing to do. Is it honest to use an execution for such a purpose? We are proud to be strangers to such honesty. If the appellants have gone beyond the law, where is the propriety of quieting them in the possession of what they have thus acquired? This should have been thought of when "*clean hands*" are talked about. No doubt the motive was, as is virtually admitted, *the want of any other remedy*. Neilson's sin was, that he was a wealthy farmer, his insolvent son owing M'Donald, who could not recover his debt except from the father.

The respondent was absent; the Deputy could have felt no alarm, and yet he advertises immediately. Why was this done? He was not pressed by the return of the execution; for the return day was not till the next January term. But it is said he had a *right* to do so. We complain that he did not act with a view to do *right*, but *wrong*, in favoring M'Donald's illegal views. It is admitted that a contrary course would have been liberal and humane. If so, it was his duty to follow it. He does not pretend to have apprehended any danger: he asks no receipt, leaves the property upon the respondent's premises, who, as appears on all hands, was a wealthy farmer, with a large real estate upon which the judgment was a lien. Yet the personal property is seised, advertised, and set up for sale in the course of nine days.

We are told that the Deputy did his duty in pursuing M'Donald's directions. This we deny. He was the officer of the Court. All his execution required was, that he should have the money forthcoming at the return. But he does not put his conduct on the ground of duty. He explained his object to Hunter, the witness.^(o) It was to prosecute the sale with rapidity, and complete it before the respondent's return. His explanation^(p) of the conversation with

^(o) His evidence is stated
6 John. Ch.
Rep. 207.

^(p) Vid. id.
207, 8.

Hunter is not satisfactory, and does not take from the force of his evidence. Indeed, there is no doubt of his purpose. Yet his conduct is called legal. Was it his duty to do more than collect the money? If not, when he did more, he was acting illegally. It was a prostitution of his office, and he became an oppressor. He resisted all delay even for a few hours, within which the respondent might have procured the money. Was this good faith? The property was set up at the hour of sale, and then comes the demand of specie. Did M'Donald want this? No. He wanted *specie in property*, to sell and re-imburse himself for the losses he had sustained by the son of the respondent. His avowed purpose was to put the money out of the respondent's power, with a view to this object. With these motives, he issues corresponding orders to the Deputy, a willing officer, who obeys them. Was not this in derogation of every rule of right? The courts of justice were open for redress against the respondent. Why not resort to them? Because there was no claim which could be enforced there. Here was concert between M'Donald and the Deputy, at least, for the same object. The excuse that the latter was accountable for delay is merely colorable. The circumstances speak a language which cannot be done away by such a pretence. The whole transaction carries management and concert upon its face. The demand of specie was most rigidly enforced, and the acceptance of the bond and mortgage show the view with which this affair was conducted.

Admitting the right to demand specie, was it fair to do this under the circumstances, and under the usual advertisement? The party and bidders had a right to presume it would be, as usual, for current bills. Suppose current bills had been tendered, would not refusal have been a surprise, against which relief should be granted? Was it not the duty of the Deputy to have refused proceeding, and given time on account of the surprise? A man must exercise even a legal right, so as not to produce surprise. Here was a virtual suppression of truth. The intention to demand specie (a thing very unusual) was not made known till the moment of sale, and if the officer was ignorant before, he

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knew enough after the great sacrifice produced by this demand on the sale to Walker,^(q) to warn him of his duty.

It is not unusual for Courts of Equity to relieve against fraud and surprise like this. Every security arising from such a proceeding, is void.

^(q) Vid. id.
208.

But it is said here is no evidence of fraudulent combination. There is certainly something much like combination between M'Donald and the Deputy. The former commands, and the latter executes. M'Donald declared that

^(r) Vid. id.
209.

"he must be a Turk that day;"^(r) and he fulfilled the office of a Turk in command. The officer was the Janissary who did execution, and the respondent was the victim. F. Livingston had no interest in the execution. He was a party

^(s) Vid. id.
210.

pro forma; yet he bid for M'Donald, bought in with great sacrifice, and gave up his purchases on the settlement.^(s) He knew all that transpired. In what other light then, does he stand than as a coadjutor? His becoming a volunteer in the fraud does not exempt him, but aggravates his guilt. Every case of fraud must be drawn from a chain of facts and circumstances. You can rarely obtain a direct avowal; but when parties act in concert to effect a fraudulent object, the law imputes combination.

^(t) Vid. id.
208.

As to Eddy, if he is not implicated, this does not affect the bond and mortgage. But he went to the auction with the same views as M'Donald. He sets forth his views in the answer. It was to make advantageous purchases,^(t) founded, not on the respondent's poverty, but on *specie*. How should he know of the specie demand, unless he had been secretly informed of it? He goes prepared with gold in his pocket—he does not deny that he understood or had heard it hinted that specie would be required, and he too joined in surrendering the purchase.^(u) He heard and knew what was going forward, and participated in it.

^(u) Vid. id.
210.

But it is said, that notwithstanding the surprise, the sacrifices made, and advantages gained, and though the sale might have been unusual and oppressive on the part of M'Donald; yet that his admissions and avowals in the answer, showing his own object, are not evidence against, nor can they be made to reach his co-appellants. This is conceded,

so far as his answer alone is concerned, if it could be disconnected with what was notorious at the sale.

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The demand of specie effectually prevented all competition at the sale, and it is well settled, that where a party takes measures to effect such a purpose, this renders the sale void. The law is jealous of sales on execution, and exacts the utmost fairness and integrity from the officers and parties who conduct them.^(v)

The denials do not meet the substance of the charge. They do not deny that the object was a sacrifice of property equivalent to the debt of the son. The bond and mortgage accomplished this object. The same exertions and course of things existed as if there had been an express agreement and co-operation. No matter, then, that here are four denials, for which accumulative strength is claimed; but if they were unequivocal, such an effect is not due to them. As one answer is not evidence against the other, so it is not evidence for the other. Each stands by itself. The body of evidence which we present, contradicting &c, equally contradicts all. Besides, being parties charged with fraud, are not the appellants subject to the imputation of wanting credibility, like a witness before a jury in ordinary cases? All the prominent facts are admitted as having taken place in their presence. At least, they are not denied, nor are they falsified by any of the evidence.

(v) *Troup v Sherwood*, 4 John. Ch. Rep. 228, 254.
Jones v. Caswell, 3 John. Cas. 29.
Hewson v. Deygert, 8 John. Rep. 333.
Jackson v. Newton, 8 John. 362, per Cur.
Tiernan v. Wilson, 6 John. Ch. Rep. 414.
Wooddy v. Baily, Noy, 59.
Executors of Stead v. Course, 4 Cranch, 43.

If, then, the sale was illegal, it indubitably follows, that the bond and mortgage are void. By the terror and tyranny of the sale, the Chancellor means its unusual nature and oppressive effect, leaving the respondent without reasonable time to avoid it according to his real ability, by the abuse and perversion of legal process. The sale was still going forward when proposals of settlement were made; his house was about to be ransacked, and farther sacrifices made. Shall we be told that this terror from the sacrifice of property will not avoid a contract? That this is not the legal definition of duress? A Court of Equity will avoid contracts for fraud or oppression of any kind.

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Was there an adequate consideration? The respondent received nothing from Eddy. He relinquished his purchase, it is true, but this was nothing, being illegal and void. The debt of the son cannot be taken into the account, for the father was not answerable. If he was, why resort to violence? Why not go into Court? But as to M'Donald, it is said he gave up a note against the son, endorsed by Boyce, with a judgment against the respondent. This judgment is protected by the Chancellor. It is to be paid; and as to the note, both maker and endorser were insolvent. If they had not been so, M'Donald would have been under no necessity of taking this course.

It is said the mortgage, &c, were given by advice of counsel and friends; but why was this advice given? In consequence of the very oppression and fraud complained of. Such an act is not voluntary. Where is the least volition in the case? It is like that of the traveller under the hand of the robber, who is required to "give, or receive the contents." Party, counsel, friends, and family are all equally alarmed. Indeed, any thing like volition is hardly pretended in the answer. Suppose the respondent had defrauded M'Donald? This is not to shut the doors of justice against him. Even a murderer must be tried and executed according to law.

(w) In 6 John.
Ch. Rep. 210,
11. He cites
Proof v.
Hines, Cas.
Temp. Talb.
111. *Gould*
v. *Okeden*, 3
Br. P. C. 560.
Kenrick v.
Hudson, 6 id.
614. *Thornhill*
v. *Evans*, 2
Atk. 330, and
Nicholls v.
Nicholls, 1
Atk. 409.

What, then, is the law? Not of Hercules and the robber, but of civilized society? Without going into this subject particularly, it is sufficient to refer to the cases cited by the Chancellor, (w) and particularly to those from Atkyns, decided by Ld. Hardwicke, whence it is plain that a contract should be set aside for any kind of fraud or oppression. In the case last cited from Atkyns, the fraud was practiced under color of legal process; yet though legal and regular, the Court of Chancery considered it a species of duress.

(x) Poth.
Trait. des ob.
s 589. 2 Inst.
714. 1 Mad.
Ch. 214.

It is conceded, that the security should stand for the valid claim alone. As to the other claims set up, the maxim, *spoliatus ante omnia restituendus*, cited by the Chancellor, (x) applies. That what is illegally, violently or fraud-

ulently obtained, should be absolutely and unconditionally restored, is a rule not only of the civil and moral, but also of the levitical law.

It may be said, that violence to personal property is not that kind of duress which shall avoid solemn instruments; but technical duress to the person is not necessary as a foundation for relief in Equity.^(y) In *Fell v. Riley*,^(z) the Court declared, that "fraud and imposition are exceptions to all rules whatsoever." Equity will relieve against securities obtained in violation of morality.

But we are told that the respondent is not to be relieved because he was forced to make his will before he gave the security; and much has been said about a family agreement. This was produced by the same violent, oppressive cause, and the same sacrifice; that this was an agreement which equity will enforce, is begging the question. Violence lies at its root; and though no injustice may have been done to the rest of the family, was there none in compelling the respondent to this premature arrangement? But the injustice is not, of necessity, confined to the respondent. It may extend to the other members of the family, from changes by death, or the losses and ultimate insolvency of the father.

It is said, that the respondent has committed frauds on M'Donald. Be it so. But has he committed any fraud in this transaction, or any way connected with it? Suppose one passes a counterfeit bill, and after the remedy is barred, the injured person retorts by passing back another in return, will the circumstances of the previous fraud protect him from the state's prison? If M'Donald has been defrauded, let him go into a Court of Equity. The very defence involves an admission that he has stretched the law. The statute allows a set off of debts, but it has extended no farther. To receive other claims as a set off, would be to make every man his own avenger. You can never allow this, then, by the way of set off, unless you assume legislative power, and extend the law to a case from which it has plainly been withhelden by the legislature.

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(y) Bac
Abr. Duress,
(A.) *Attorney
General v. So-
thon*, 2 Vern.
497, per Cur.
*Woodman v.
Skute*, Prec.
Ch. 266. Jac.
L. D. Duress.
2 Danv. Abr.
686. *Reigal v.
Wood*, 1 John
Ch. Rep. 406,
per Kent, Ch.
*Barnesly v
Powell*, 1 Ves.
120, 284, 289
(z) Cowp.
281.

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But here is no fraud on the part of the respondent, (the counsel examined the evidence upon this point,) or if otherwise, the account on this subject was long since closed by the various law suits between the parties ; or being long antecedent to the bond and mortgage, it comes back to the question of set off.

The set off is not in issue by the pleadings, and nothing is better settled than that, in Chancery as well as at law, the recovery or defence must be *secundum allegata et probata*.(a) This, alone, would be a fatal objection to the defence, if technical ground were necessary. But the objections resting upon general principles are equally strong. Aside from the principle, which the Chancellor has established upon authority not to be shaken, that what is obtained by fraud must be absolutely restored, the rules in relation to set off are equally plain against the admissibility of the cross claims insisted on by M'Donald. What are these rules?

At common law, there was no set off. It should be borne in mind that this is a proceeding to redress a tort. The nature of the respondent's claim, and those attempted to be introduced against it, equally forbid the set off. To warrant a set off says Montague,(b) "There must be mutual debts." "A set off cannot be pleaded to an action upon a tort."(c) Nor to damages due upon a special agreement.(d) In *Howlet et al. v. Strickland*,(e) which was covenant, and an attempt to set off damages for breaches in the same covenant, Ld. Mansfield said, "I take this plea to be merely for the purpose of delay. The act of parliament, and the reason of the thing, relate to mutual debts only. These damages are no debts. An *indebitatus assumpsit* could not be brought for them." The same point was determined accordingly, in *Weigall v. Waters*,(f) and *Livingston v. Livingston*, in equity.(g) Indeed the rule is the same both at law and in equity.(h) Evans in his commentary on Pothier,(i) says that, "by the common law of England, if the plaintiff was indebted to the defendant in as much or more than the defendant was indebted to him, it was no defence." He places the right of set off upon the stat. 2 and 8 Geo. 2, enacted here ; and, as appears by several of the author

(a) *James v. M'Kernon*, 6 John. Rep. 543.

(b) Mont. on Set off, 17.

(c) id. 18. *Keeler v. Adams*, 3 Caines' Rep. 84.

(d) Mont. on Set off, 19. *Gordon v. Bowne*, 2 John. Rep. 150, 155, 6. *Colson v. Welsh*, 1 Esp. Rep. 378.

(e) Cowper, 56.

(f) 6 T. R. 488.

(g) 4 John. Ch. Rep. 287.

(h) *Duncan v. Lyon*, 3 John. Ch. Rep. 351, 358, 9, 360, and the cases cited at the pages last quoted.

(i) 2 Ev. 112.

ities which we have cited, the construction upon ours, and the English statutes has always been the same. It is from Pothier's head of set off or *compensation*, as it is called in the civil law, that the Chancellor has taken the maxim complained of as inapplicable. Pothier,(j) introduces it by saying, that, "in the case of spoliation, no compensation can be opposed against the demand for the restitution of the things of which any person has been plundered, according to the well known maxim, *spoliatus ante omnia restituentus*. V. *Sebast. de Medicis Tract. de Compens. P. 2, s. 28.*" Let it not be said that the claim here comes in any other character than that of a set off. M'Donald claims to hold a mortgage on account of a debt which the respondent had assumed.

The decree, then, equitably places the parties where they were, and throws them back upon their legal and equitable rights, as they stood before the sale. M'Donald is deprived of nothing but what he obtained illegally. Here is no pretence, therefore, for applying the maxim, that equity will not take away a legal right, because there is none. As to the rights of third persons, it may be true that a legal advantage will not be rigidly scrutinized, though perhaps obtained in rather a questionable manner. But, in general, wherever one means to protect himself by a legal advantage, it must have been obtained fairly. And so are all the authorities, if we except Fagg's case. This case is nowhere reported. It is cited by the Chancellor from recollection, in *Huntington v. Greenville*,(1) and again in *Hitchcock v. Sedgwick*,(k) where it is again stated from recollection, but materially different in point of fact. It is then repeated from Vernon, in the 1. Eq. Cas. Abr. 354. It was but slightly adverted to in both instances, and as the case is stated in the 2 Vernon, had the legal advantage there supposed been enjoyed, it would have been a reproach to the administration of justice.

The objection, that we should come with clean hands, proceeds with an ill grace from a man whose hands are stained with fraud, and one who has driven us here for relief. The maxim relied upon, that when both parties are equally guilty, the Court will not interfere between them,

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(j) 1 id. 410

(1) 1 Vern
52, 3.
(k) 2 Vern
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but leave them to hold what they have acquired, might just as well have been applied to our side, to show that, having been successful in the Court below, this court should leave us in possession of the decree which we have obtained.

The delay is no objection. Nothing short of the statute of limitations can come in this shape, and it is enough that there has been no act confirmatory of the sale or securities. The insolvency and assignment of the property of J. Neilson, jun., does not vary the case. The assignment to the father was in trust, for all the creditors, of whom M'Donald is one; and the inventory and discharge did not take place till after the bill was filed.

The releases are a part of the assignment, and the bond and mortgage are the consideration of both. The latter being done away, both the release and assignment cease to operate.

Lastly, Griffeth & Eddy are not competent witnesses. They are charged as coadjutors, and are liable for costs. This is called a contingent interest. The same rule would make every defendant a witness. His interest is contingent, in the same sense; for it is not known till judgment. The true rule is, that where the evidence puts them on their defence, they are incompetent. Their testimony then becomes necessary, in exculpation of themselves. Besides, F. Livingston was a party to the execution. He had, in this point of view, an interest independent of being a *particeps fraudis*. The case of *Teirnan v. Wilson*,^(l) and *Wooddye v. Baily*,^(m) show that we might have made Griffeth, the deputy, a party, even in law. This consideration, alone, should exclude him.

(l) 6 John.
Ch. Rep. 411.
(m) Noy. 59.

T. J. Oakley, in reply. It is not denied, that in the abstract, here has been a severe and harsh exercise of legal rights. But if it be true, as set up in the answer, that there had been a concert on the part of the respondent and his son, with intent to defraud M'Donald, which had been carried into effect, the case then presents no violation of morality, in his attempting to avail himself of a legal advantage to redress the injury.

Before we examine the case, we ought to determine what witnesses are to be heard. Are Griffeth and Livingston competent? It is said not, because they are charged with fraudulent combination. But, in this way, all witnesses may be disqualified by a complainant. The allegation in the bill is not enough to produce such an effect. No decree is prayed against them; and they have no control over the bond and mortgage, the subject matter of the suit. Their interest, then, must depend upon their situation, as it appears from the evidence.⁽ⁿ⁾ As to costs, they can be in no danger, for the mortgage is retained in the decree, to the amount of the judgment, and it is agreed to have been retained properly. This is abundantly sufficient to discharge all costs. But the doctrine is settled in favor of their competency.^(o) Even a guardian, *ad litem*, for the complainant, is not incompetent, though liable to costs, if they are decreed; and the reason is, because the costs are within the discretion of the Chancellor: they are, therefore, considered contingent.^(p) The case of *Colton v. Luttrell*,^(q) is directly in point. So is the case of *Man v. Ward*,^(r) and these cases go upon the general rule, that where no decree can be had against defendants, where they are not substantial parties, there they are admissible.^(s) Their interest is, in such cases, entirely contingent.

It is not questioned, that by a concurrence of accidental circumstances, we have been enabled, through a rigorous exertion of legal right, to redress previous injuries. But much labor has been exerted, to prove what we do deny, viz. that there was a pre-concert among the appellants, to effect this purpose. Yet this is equally immaterial, if our acts were legal.

But take the other view of the subject. Suppose combination material—the rule is, that the answer of one defendant is not evidence against the other. Both at law and in equity, a man is not implicated by the declarations of another, unless he is present, and either assents or does not contradict them. Another rule is, that where a fact is charged, but denied, in order to do it away, there must be a contradiction by two witnesses; and the Court will never presume

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⁽ⁿ⁾ *Pidcock*
v. *Brown*, 3 P.
Wms. 288.

^(o) *Bebes et*
al. v. The
Bank of New
York, 1 John.
Rep. 529, per
Spencer, J.,
556, and per
Kent, Ch. J.,
577, 8.

^(p) *Lupton*
v. *Lupton*, 2
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614.

^(q) 1 Atk.
451.

^(r) 2 Atk.
228.

^(s) *Dummer*
v. *Corporation*
of *Chippen-*
ham, 14 Ves
250, 1. *Whit-*
worth v. Da-
vis, 1 Ves. &
Bea. 549, 550

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more from given circumstances than is necessary to account for them. Now the only charge of combination is with a view to compel an assumption of J. Neilson junior's debts. There is not a particle of pretence that this was ever an object of either of these appellants. They never expected it. They expressly and solemnly deny this, and it must be made out by more than one witness. Where a charge in the bill is explicitly denied, the Court will not slightly reject the answer. This denial is attempted to be repelled by circumstances alone; and there is no proof whatever, of previous combination, with the view alleged, nor with any view, except at one or two insulated conversations. One was with Griffeth, before the sale, which he explains away; the other with M'Donald and others, stating confessions subsequent to the sale. Both amount to but little, and being a most suspicious kind of evidence, at best, and made without the knowledge or assent of other defendants, should never be received to countervail the solemn denials set up in the answer, by any of the defendants. As to Griffeth's declarations, admitting them to be as sworn to by Hunter, you are to presume no more than will account for them; and his intent to sell as rapidly as possible, under the direction of M'Donald, is all that can be presumed within the rule. Eddy's conduct is accounted for by the fact that he was bidding to secure a debt of his own. This is enough, independent of the other evidence, which is also strong. He offers if his debt can be paid, to advance the money, and stop M'Donald's operations. He must be implicated, it seems, merely because he goes, bids, and buys for specie.

But suppose the whole charge of combination to be true. Even if it be illegal, can this affect a legal act? The demand of specie, and the respondent being a rich man, worth \$20,000, form, it seems, the law of his case against the sale. Suppose him worth \$10,000—the rule is just one half as strong; and when you come down to the poor man, it ceases to apply. But the truth is, the question, as to the demand of specie, and the manner of proceeding, was one of mere discretion in the officer, which he might exercise one way or the other, at his pleasure; and *Bray v. ———*, cited

in the opening, is a complete illustration of the rule which governs in this case. Bank bills were refused from mere pique, yet the Court denied an injunction to stop the sale of the goods distrained. A Court has just as much right to say that M'Donald shall receive bank bills, as they have to set aside this sale. If the transaction was legal, the severity of the proceeding was a case for the determination of his own conscience. There is no pretence that the act of sale was hurried. Sufficient time was taken for this purpose, and the sale was perfectly regular.

But the proceedings have been likened to an effort to prevent competition among bidders, which it is agreed should avoid a sale. That is where the Sheriff may act otherwise, without being possibly accountable. Here he might have been. The respondent's circumstances cannot control the rule. Whether his property was abundant or scanty, in either case there was a possibility of injury to the Sheriff, had he disobeyed M'Donald's directions. That the whole must have been matter of discretion is plain, from the very circumstance that the law gives no rule. What are current bank bills? Are they those on the bank of Niagara, or on the banks of New York? Is their goodness or badness matter of law? Can degrees of *perversion*, as it is called, be thus settled? No. The deputy proceeds with promptness, and obeys the plaintiffs at those very points where obedience was a duty. As to grouping the property, and whether it shall be sold in lots or separately, to which several of the cases cited on the other side relate, this is another affair, in which the discretion of the officer comes in; but this does not apply either to the demand of specie or the postponement. Why, then, is the great sacrifice of property pressed upon us? If the sale was illegal, this was enough. It should be set aside. If legal, the sacrifice was a natural consequence, which cannot be made the basis of relief. There was a regular advertisement; but had it been otherwise, the sale would have been valid.

It is said the sale was oppressive and tyrannical, a species of duress which should avoid the bond and mortgage. But

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(t) See post,
the statement
of Eddy's case
by the Ch. J.

(u) Vid. the
1st concluding
point of the
Ch. Justice's
opinion.

(v) 6 John.
Ch. Rep. 211.

what is this oppression and tyranny? The amount of it is, that, by legal means, M'Donald obtained these securities. Take the case of a suit commenced and driven to judgment and execution, for a debt, which leads the defendant to comply with the demands of the plaintiff, for a farther security: it is equally easy to decry all this as oppressive, abusive, tyrannical, &c. When are you to draw the line? The law has prescribed its own rules. Property cannot be sold without a judgment, execution and advertisement. Are all the legal guides to be rejected, or confounded with mere discretion? Eddy offered the respondent specie, to redeem the execution, (t) but the offer was declined, because a trifling premium was demanded. What extraordinary danger, then, did he stand in? Was he so entirely in M'Donald's power as to be unable to help himself? Suppose he had refused to borrow the money at all. He was helpless only to the amount of the premium. It is plain, from the evidence, that he obstinately refused to exercise the means within his reach. Then, after the sale is carried on for some time, with the advice of his counsel and friends, and in consideration of surrendering the sales, and giving the releases and assignment, he assumes the debt of his son, by way of advancement upon a family arrangement. This is a very ordinary advancement. It was the simple act of paying the son's debt, and taking it out of his portion. The son's consent was not necessary. The respondent had before offered to purchase these very debts, at five shillings on the pound. (u) This distinguishes it from the case of *Nicholls v. Nicholls*, (1 Atk. 409,) referred to by the Chancellor, (v) where there had been no previous negotiation. In the present case, the transaction was little more than the consummation of an old bargain; and, being reasonable, should not be set aside.

It is said, on the other side, that the authorities which we cite present the case of advantages obtained legally; and that none but Sir John Fagg's case go farther than to protect agreements thus obtained. But the cases are abundant to show that the reason of the thing is the only question in Chancery. Thus usury, duress, &c., if set up and proved as a defence, wholly avoid the instrument sought to be en

forced ; but on a bill filed, the complainant is holden to do full equity before he will be relieved. So here, if there is a technical duress sufficient to avoid the securities at law, let it be done. But coming here, as complainant, the party must be judged according to the rules of equity ; and, as a condition of relief, must do what is reasonable on his part. The respondent acted under the advice of counsel. Whether this advice was right or wrong, is not the question. It is enough that his act appears to have been in the presence of, and by the aid of counsel, and therefore deliberate. In *Stapleton v. Stapleton*,^(w) it is said, "This Court always considers the reasonableness of the agreement ;" and *Pullen v. Ready*,^(x) and *Stephens v. Bateman*,^(y) show that though there be a mistake, or the bargain unequal, it will not be set aside, if made under the advice of counsel. In *Payne v. Dudley*,^(z) it is said, "Courts of Equity never interfere to deprive the plaintiff at law of any legal advantage which he may have gained, unless the party seeking relief will do complete justice by paying what is really due. Indeed they have, upon the same principle, gone so far as to refuse their assistance, in relieving against a judgment, obtained by fraud." The case of *Cranstown v. Johnston*, cited in the opening, was decided upon this ground. Thus the Court will not look to the manner only, but the matter of the agreement, and withhold their assistance until every thing reasonable is done.

Here was a negotiation for an entire settlement, not only between the respondent and M'Donald, but between them and the son. All debts due both from the father and son are released. Now the son is no party to the bill ; and can never be concluded by the proceedings in the suit. The decree, then, presents this case : the father first negotiates the release of the son, and then goes to equity, gets relieved himself, and thus procures the discharge of both. It is no answer to so plain an absurdity, that the son is insolvent. He may be a man of property hereafter, and be compelled to pay the debt. The rule as to parties is not matter of degree, to be determined by speculation and probability. M'Donald, alone, has a right to compute the value of the debt ;

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^(w) 1 Atk.
10.
^(x) 2 id. 591
^(y) 1 Br. Ch.
Rep. 25.

^(z) 1 Wash.
Rep. 196.

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and if there is any thing in the rule that you will not relieve till the parties can be fully remitted to their respective rights, you will refuse relief in this instance. You never can so modify the decree as to affect the rights of the son. Besides, he has since been discharged under the insolvent act, by the aid of his father, who is the assignee representing the rights and liabilities of the son. M'Donald has thus lost one of his principal remedies.

But if these securities are not to stand for the whole claim, what shall they stand for? The Chancellor correctly admits that they are good for something. We do not urge any claim by way of set off. We know this cannot be allowed. All we say is, that here is a legal security, which must stand for all the demands taken into contemplation by the parties to the contract, even had they been damages for an assault and battery or any other tort. It is enough that the claims of M'Donald might have been pursued, or even that he might have attempted to pursue them against the respondent. For these the respondent insisted upon a release, which certainly applied to the frauds practiced by the replevin, and the respondent's wrongful act in appropriating the avails of the raft. As to the property declared for in the replevin, the right was settled by the suit at law. For that which the respondent omitted in his declaration, he might have been pursued as a trustee in a Court of Equity. The raft-claim stands on a still stronger ground. Admit that the contract was executory and would not technically pass the timber, (a) the consideration of the sale (a pre-existing debt) was paid. That contract could have been enforced as an equitable right against both father and son, the former having full notice; and declaring that M'Donald's debt is the last which his son shall pay. To produce still further injustice, the respondent waits till all remedy upon the raft agreement is barred by the statute of limitations before he comes for redress against these securities. Turn him round, then, and place him upon his legal rights.

(a) Vid. post, introduction to Ch. Justice's opinion: also, Judge Woodworth's opinion, who states the facts upon this point.

But it is said the pleadings have not set up our adverse claims. It is entirely immaterial, whether this be so or not. When our securities are assailed by the respondent's plead-

ings, we have a right to show the whole matter, in order to repel his claim, as essentially connected with it. The pleadings, however, do tell the whole story. We set up the fraudulent proceedings of the respondent as the reason for demanding specie and making advantageous sales; and allege that he was morally bound to refund to M'Donald the avails of the raft and other property, &c. This is sufficient. No particular form of words is necessary. The fraud is presented in the answer as we claim to use it here, by way of repelling the demand set up in the bill.

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WOODWORTH, J. The object of the bill is, to be relieved against a bond and mortgage, given by the respondent to William M'Donald, and a note of fifty dollars to Seth Eddy

Object of the
bill.

The appellants are charged as parties to a fraudulent combination to oppress the respondent, by the sacrifice of his property at a Suetiff's sale, in order to indemnify themselves for certain debts against John Neilson, jun., a son of the respondent.

The charges
of the bill.

On the 22d Nov. 1819, the appellants and others attended the sale, when personal property to a large amount was sold by Griffeth, and purchased chiefly by M'Donald and Eddy. It is not necessary to occupy time, by a minute statement of facts. I shall merely observe, that the respondent was a man in affluent circumstances, having a large real and personal estate of from 12 to \$15,000. The amount of the execution was \$480 83. It appears that the respondent requested Griffeth, the officer, to delay the sale, until he could send about three miles and procure the money; Griffeth declined taking any thing but specie. The respondent then offered to pay in specie the next day, or as soon as a person could go to Waterford and return: security was offered for the performance. These propositions were rejected on the ground, that M'Donald insisted on an immediate sale, although the execution had been but a few days in the officer's hands. M'Donald, in his answer, admits the demand of specie was with the view of preventing the respondent from obtaining the means of satisfying the execu-

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the facts.

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tion, with as much facility as he otherwise might have done, and with the view of making advantageous purchases, in the hope of saving a large amount due to him from John Neilson, jun. ; believing that the respondent had fraudulently combined with his son, to prevent the collection, and was morally bound to refund the avails of a raft, of which he fraudulently got possession. After selling the out door property, and when the officer was about to commence the sale of the furniture, the respondent was prevailed on by the advice of his friends, and in order to prevent a further sacrifice, to make an accommodation, by which \$2500 was secured to M'Donald in satisfaction of the execution and his debt against John Neilson, jun. The property sold was then given up.

Whether the
contract can
be upheld.

I have thus glanced at the material facts ; the question is, can a contract, entered into under such circumstances, be upheld in a Court of Equity ? I am clearly of opinion it cannot, without overruling long established and well settled principles, hitherto considered of vital importance to protect against that species of oppression, which is sought to be justified under the forms of law. With respect to Griffeth, certain duties devolved on him as a public officer ; he was undoubtedly to take all necessary and lawful means to comply with the exigency of the writ, and thereby to secure to the plaintiff in the execution, the fruits of his recovery. As to time, place and manner of sale, a sound discretion was vested in him ; but in full confidence that it would not be abused. It is indispensably necessary to the due administration of justice, that the exercise of this discretion should never be under the direction of one party, so as to oppress and bring ruin on the other. The officer is bound to consult his own judgment, to act firmly, but temperately, and in no case can he, without just reprehension, lend himself to the views of either party, or become the instrument to avenge their real or imaginary wrongs.

Officer to
take necessary
lawful means
to secure debt.

But time,
place, manner
of sale, in his
discretion.

Not to obey
one party, so
as to oppress
the other.

Officer's con-
duct unjustifi-
able, wanton,
oppressive, not
excused by or-
ders.

The conduct of the officer was altogether unjustifiable, wanton and oppressive ; it is neither palliated or excused, by proving that he acted under the orders of the plaintiff in the execution. After property, valued at \$1200 and up-

wards had been sold for \$300, a suspension takes place, the negotiation is concluded and the mortgage given. Did the parties treat on equal terms? Was the respondent under no restraint? Was he induced to compromise to save his property from further sacrifice? It seems, to me, there can be but one opinion on this subject. If so, can a lawful contract be upheld by such means? Here was a pressure upon distress, which, in the view of a Court of Equity, entitled the respondent to relief.

The bond and mortgage must stand as a security for the amount due on the execution, with interest to the time of tender. It is scarcely necessary to cite authorities to prove, that where advantage is taken of the party's circumstances, so that he acts not voluntarily but under necessity; where a deed is obtained by undue influence, and the process of law abused, a contract resting on such a basis cannot receive the countenance of a Court of justice. (*Nichols v. Nichols*, 1 Atk. 409. *Thornhill v. Evans*, 2 Atk. 330. 1 Mad. 243. *Gould v. Oxenden*, 3 Bro. P. C. 560. *Thornhill v. Evans*, 6 Bro. P. C. 614. *Lamplugh v. Lamplugh*, 1 Dick. 411.)

But it is contended by the appellants, that the mortgage ought to stand as a further security, on the ground that the respondent, after notice of M'Donald's equitable interest, fraudulently interfered and prevented his receiving the avails of the raft. The first objection to this is, that the claim for the raft is not in issue between the parties, on the pleadings in this cause. The bill is silent on this subject. The answer of M'Donald professes to state the evidence given on the trial of the suit in replevin; and, among other things, alleges, that the defendants proved that John Neilson, jun., in 1816, sent a raft to New York worth 1000 or 1200 dollars, which he had contracted in writing to deliver to M'Donald, in part payment of the debt due to him; that the raft had been withheld from him by the respondent, who received the avails; and that on a trial of an action of trover against Hewit, John Neilson, jun., testified that the respondent was to pay out of the avails, certain debts, among which was a debt due to Rockwell and Stebbins. In another

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Securities to
stand for debt.

Advantage taken of party's circumstances, &c., a cause to set aside contract.

Whether mortgage to stand as security for avails of raft, &c.

Not in issue

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part of the answer, M'Donald states, that his conduct at the sale was in the hope of saving a portion of the debt due to him from John Neilson, jun.; but it is no where averred, that the respondent in this cause was bound to account for the raft, nor is it urged as a ground of equity, that the bond and mortgage should stand as a security for the same.

It is impossible, from the scope of the answer, to make out that any such claim was relied on in this cause. The proof given on the trial at law, and the belief that the respondent had fraudulently combined, are suggested as justifiable grounds, in the opinion of M'Donald, for pursuing a rigorous course at the sale, and for believing that the respondent was morally bound to account for the raft. These facts are introduced with others, to show the motives which governed the appellant. The respondent could not consider himself called on to admit or deny this statement. It was not put in issue. The respondent has not gone into any proof respecting the raft, nor the former trial; reposing himself, as he well might do, that by the pleadings they were not drawn in question. The rule laid down in *James v. M'Kennon*, (6 John. 564,) is, that "every material allegation should be put in issue by the pleadings, so that the parties may be duly apprised of the essential inquiry, and may be enabled to collect testimony, and frame interrogatories in order to meet the question." So also in the case of *Stewart v. The Mechanics and Farmers Bank*, (19 John. 505,) it is laid down as an undeniable principle, that the decree of a Court of Equity must be founded on some matter put in issue between the parties. It is bound to decide according to the allegations and proofs, as much as a Court of law.

Every material allegation should be put in issue.

But admitting the claim for the raft is sufficiently alleged to call on this Court for an opinion, whether the bond and mortgage shall stand, as a further security, for whatever may appear to have been received by the respondent, I will next examine its validity. The claim is for unwarrantably interfering, so as to prevent a delivery of the lumber. Could M'Donald maintain an action at law to recover dam-

ages? I apprehend not, for he never acquired title to the property. His claim rested on an executory contract, made with John Neilson, jun. In *M'Donald v. Hewit*, (15 John. 349,) the Supreme Court held that the contract was executory, and did not vest the property; and therefore the plaintiff could not maintain trover for the conversion. The right of action would be against John Neilson, jun. The case appears to be this: the father interfered and caused the fund which the debtor had stipulated to be applied to M'Donald, to be diverted and paid to other creditors. I think the conduct of the respondent was reprehensible; but the question is, has the law provided a remedy for the act? It is not included within the legal notion of fraud. I have not been able to discover any authority that establishes a liability in such a case. None was adduced on the argument. From the acquiescence of M'Donald, after the decision in the cause against Hewit, and no attempt to sustain a prosecution against the respondent, it may be inferred, that a recovery was considered hopeless.

John Neilson, jun., testifies, that although the interference of his father was without his authority, yet he afterwards approved of it, and that the respondent has paid to his creditors much more than the avails of the timber. It is true, that on the trial against Hewit, he testified that the debt of Rockwell and Stebbins was to be paid by the respondent, and on the subsequent trial, he does not prove that fact. If his testimony is impeached in this particular, the appellant has had the benefit of it in the replevin suit, in which he succeeded. The execution in favor of Rockwell and Stebbins was held to be fraudulent, and probably on the ground that the respondent had paid that execution, with money received on sale of the timber.

Is, then, this claim respecting the raft, for which M'Donald could not sustain an action either at law or in equity, as plaintiff, capable of being now resuscitated and enforced as an equity, which the respondent is bound to satisfy?

It cannot be viewed in the light of a set off. To constitute that, there must be mutual debts. (Montagu, 17.) A Court of Equity follows the same rules as a Court of Law,

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To warrant
set off, there
must be mu-
tual debts, be-
tween same
parties in their

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own right, of
same kind or
quality, and
clearly ascer-
tained.

A court of
equity follows
same rule as a
court of law
in this respect.

Decree as
to Eddy, erro-
neous.

Facts relied
on to implicate
him

as to set off. The debts must be between the parties in their own right, and must be of the same kind or quality, and be clearly ascertained or liquidated. (*Duncan v. Lyon*, 3 John. Ch. 359. Ambler, 407. 3 Caines, 84. 2 John. 150, 155.) We must conclude from the evidence that the avails of the raft are not in the respondent's hands. Although M'Donald is a sufferer by the interference of the respondent, there seems to be no doubt, that the sum has been fully applied to other creditors. If it be conceded that M'Donald could have no redress, suing as a plaintiff, it certainly disposes of the claim to have the mortgage stand as a security. It would be altogether arbitrary to say, that an injury, for which there is no redress by the laws of the land, should be recognized in equity, as a condition upon which relief will be granted in a case, of itself, not admitting of doubt.

The decree as to Eddy is erroneous. He attended as a bidder, and had a right to purchase and retain his purchase. He cannot be affected by the conduct of the other appellants, unless there is proof of combination between them, for the purpose of sacrificing the respondent's property. The proof does not rise higher than slight suspicion, and cannot lay the foundation for a judgment or decree. I will notice the principal facts relied on to implicate him. Henry Neilson says he was impressed with an opinion, that the appellants were combined together, and acted in concert; but no reasons are given, except that Eddy was present, and one of the purchasers. John Walker says, that from the circumstance of the appellants bidding at the sale, counselling together, and the declaration of Griffeth, that he would be ruled in his conduct by M'Donald, he believed all the defendants acted in concert. Now the premises did not warrant any such conclusion. The fact is neither proved or disproved. Besides, what connection had the declarations of Griffeth with the question of combination?

Walter Broughton says he was in the store of Eddy in the evening of the day of sale—that M'Donald, Livingston and Griffeth came in—that much conversation took place, and the appellants appeared to be gratified at the result of the

sale—that he saw money, in gold, pass between M'Donald and Eddy—that Eddy checked the conversation, which the witness thought was out of kindness to his feelings; he being a connection of the respondent by marriage. It would be extremely dangerous, as well as unjust, without further explanation, to allow such acts and declarations, as evidence of combination.

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If the testimony of Griffeth is admitted, it appears that the gold, which passed between him and Eddy, was a repayment of the money bid by Eddy, and paid to the officer. My conclusion, however, from a review of the pleadings and proofs, would not be affected, if the depositions of Griffeth and Livingston are suppressed.

R. M. Livingston proves, that Eddy offered to pay the amount of the execution, in specie, if his debt of \$50, against John Neilson, jun. was secured.

Eddy, in his answer, denies any concert or agreement, or that he attended the sale in pursuance of any arrangement. There is no evidence to destroy this denial, in the answer. The respondent assumed the payment of Eddy's debt, in consideration of his relinquishing his purchases at the sale. The decree, as to Eddy, should be reversed, and the bill, as to him dismissed with costs. As to the other appellants, it should be modified, by directing that the assignment executed by M'Donald to the respondent, be delivered up to be cancelled, and that, in other respects, the decree of the Chancellor be affirmed.

Bill should be
dismissed as to
him;
And modified
as to the other
appellants.

SUTHERLAND, J. The merits of this case are in a very narrow compass. The bill, the answers, and the proofs, substantially concur in all the material facts; and the principles of law, which are involved in it, are among the simplest and the best established known in our Courts.

William M'Donald, in October, 1819, obtained a judgment, in the Supreme Court, against John Neilson, the respondent, for \$480 83. On the 10th of November following he caused an execution, against the property of the respondent, to be issued on the judgment, and delivered to the appellant, William Griffeth, who was then one of the depu-

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facts.
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execution--ad-
vertisement.

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ties of the Sheriff of Saratoga. It was levied on the 13th of November, upon all his personal property, consisting of cattle, horses, hay, grain, farming utensils, and household furniture. Advertisements, in the usual form, were immediately put up, giving notice of the sale, at public vendue, on the 22d day of the same month. The respondent was in the city of New York, when the levy was made, and did not return home until the evening preceding the day of sale. He is admitted and proved to have been a man of large real and personal estate—estimated, by all the witnesses, at from 12 to 18,000 dollars.

Proceedings at
the sale.

On the day of sale, all the appellants went to the house of the respondent, and upon his being informed by Griffeth that he had come to sell his property, he requested a postponement of the sale, as he had not then the money sufficient to pay the execution : and, either at that time, or soon after the sale commenced, requested a suspension for a few hours, until he could send three miles, to the village of Stillwater, and obtain the money. This request was not only refused but he was informed that nothing would be taken in payment but specie. He then offered the most ample security, for the payment of the specie, in as short a time as it could be procured from the village of Waterford, a distance of about 13 miles. R. M. Livingston, and others who were present, joined the respondent in his solicitations for delay and offers of security ; and remonstrated, in the strongest terms, against the harsh and oppressive proceedings of the appellants. Griffeth, the Deputy Sheriff, submitted himself entirely to the directions of M'Donald, who refused to suspend the sale, or to take any thing in payment but specie. The sale accordingly proceeded, and all the out door personal property of the respondent, which, at the lowest estimate, is proved to have been worth 1200 dollars, and, at the highest, 2000 dollars, was sold, and bid in by the appellants, for an aggregate amount of less than 300 dollars, leaving 200 dollars still due upon the execution.

Compromise.

In this stage of the proceedings, when the appellants were about entering his house, for the purpose of selling his furniture, the respondent, at the urgent solicitation of his friends,

consented to propose a compromise with M'Donald. M'Donald offered to stop the sale, and procure a restoration, to the respondent of all the property that had already been sold, if he would pay him the amount of a judgment which he held against his son John Neilson, jun., for 1600 dollars, and also a note of his son, for 800 dollars, endorsed by one Jacob Boyce, together with the judgment upon which the sale had taken place ; and the respondent finally consented to give him his bond and mortgage, for 2500 dollars, payable in five annual instalments ; and M'Donald accordingly restored to him the property sold, discharged his judgment, and assigned to him the securities against his son and Boyce. John Neilson, jun., and Boyce are both proved then to have been, and still to be insolvent.

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Neilson.

Bond and
mortgage of
\$2500.

R. M. Livingston states, "that he and the other friends of the respondent, were induced to advise him to settle with the said M'Donald, his demands against the said John Neilson, jun., by the circumstances, that the property already sold out of doors, and what would probably be sold within the house, would amount to more than M'Donald would demand as a condition of abandoning the proceedings under said execution ; and by the further circumstance, that it was believed, *that he might not be able to regain his property, or its value from M'Donald, if it should be carried away by him :*" and further states, "that he believes that the respondent's principal inducement to make such settlement, was the same as actuated him and the respondent's other friends in recommending such settlement."

Upon this simple, naked statement of facts, (excluding, for the present, all consideration of the equitable claims which M'Donald alleges he had against the respondent,) can any man hesitate to say, that this sale was most oppressively conducted, for the express purpose of compelling the respondent to assume the debt of his insolvent son, which he was under no obligation, either legal or moral, to pay ? and are not the common sense and the instinctive feelings of every man outraged, by the allegation, that the respondent freely and voluntarily executed the bond in question ? He was

Sale was oppressively conducted to compel respondent to assume debts of his son.

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(b) Bac. Abr.
Duress. At-
torney Gene-
ral v. Dutrie
et ux., 2 Vern.
497. Proof v.
Hines, Cas.
Temp. Talb.
111. Gould v.
Okeden, 3 Br.
Ch. Rep. 560.
Kenrick v.
Hudson, 6 Br.
P. C. 614.
Nicholls v.
Nicholls, 1
Atk. 409.
Thornhill v.
Evans, 2 id.
330.

under a species of duress which left him no volition.(b) He was compelled to elect between the sacrifice of his whole personal estate, and the giving of the security. If the appellants had a right to put him to that election, he must abide by it. But, in my judgment, there must be a lamentable defect in that system of laws which sanctions such proceedings; and, if I do not much deceive myself, I shall be able to vindicate the system, which we have the honor to administer, from so serious an imputation.

The object of M'Donald, in refusing a postponement of the sale, and demanding specie in payment of the execution, and of the bids which were made, is perfectly apparent upon the face of the transaction. It is not pretended, that any apprehension was entertained, that the property would have been removed, if the sale had been postponed, or that the security offered was not ample and unquestionable, or that the paper currency of the country was so depreciated or uncertain in value, as to render it unsafe to receive it in payment. But the motives of M'Donald are not left to be gathered, as a matter of inference. He has boldly avowed them in his answer. "He admits that he did require payment in specie, at the sale, with the view of preventing the respondent from obtaining the means to satisfy the said execution, with as much facility as he might, perhaps, otherwise have done, and with the view of making advantageous purchases thereat, in the hope of thereby saving a portion of the large amount justly due him from the said John Neilson, jun., (defendant then and still believing that respondent had fraudulently combined with said John Neilson, jun., to prevent defendant from collecting the same.)" It stands, then, admitted upon the case, that the sale was conducted in a rigorous and unusual manner, not for the purpose of obtaining satisfaction of the execution, but of obtaining payment or satisfaction of a debt against a third person.

Whether a
sale upon a *fi.
fa.* otherwise
legal, is affect-
ed by the ille-
gal purpose for
which it is
made.

The question then is, whether, admitting that the sale could not have been impeached, if this fact had not appeared, it is affected by the illegal purpose for which it was made; for, if the sale was, in judgment of law, fair and legal, and vested M'Donald with a title to the articles purchased by

him, then, undoubtedly, the restoring those articles to the respondent, affords a good consideration for the bond which he gave. But, in my judgment, the sale was fraudulent, and passed no title to any party to the fraud, in any article purchased at the auction. I shall assume, for the present, (what I think is incontestably established by the proof,) that Griffith and Livingston, at least, perfectly understood the object of M'Donald, and lent themselves to the consummation of his purpose. It presents, then, the case of a combination or conspiracy, between the plaintiff in an execution, and the officer who is to execute it, so to conduct the proceedings under it, as to render it difficult, if not impossible, for the defendant, with the most abundant means, to pay it; and so as to prevent the possibility of competition at the sale, for the avowed purpose of producing a sacrifice of the defendant's property, and enabling the appellants to *make advantageous purchases*. Can there be a doubt, if the sale had proceeded, and no compromise had taken place, and the respondent had filed his bill for relief, that the Chancellor should have set aside the sale, as fraudulent, so far as the appellants were the purchasers, and have compelled them, upon receiving the amount of their debt, to restore the property purchased to the respondent, or if they had parted with it, to pay him its full value?

The case of *Lord Cranstown v. Johnston*,^(c) is a direct authority to this point. In that case, Johnston, having a just debt of £2500, against Lord Cranstown, and not being able to obtain satisfaction of it in England, instituted proceedings against him in the island of St. Christophers, where he had an interest in a valuable estate. He obtained a judgment against Lord Cranstown, under which he caused his interest in the estate to be sold, and became himself the purchaser, through the medium of his agent. The proceedings were admitted to have been in strict conformity to the law of the island, and to have vested in Johnston the legal estate in the property purchased. Lord Cranstown filed his bill for relief against the sale, and prayed a re-conveyance of the estate, upon payment of the debt and cost to Johnston.

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^(c) 3 Ves. jun
170.

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Johnston* sta-
ted.

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He founded his claim to relief upon several grounds :

1. That when the suit was commenced, he was not personally resident in St. Christophers, was never served with process, nor appeared in the cause.

2. That when the suit was instituted, he was in treaty with the defendant, for securing the debt—that notwithstanding the treaty, the defendant directed the proceedings, to procure an absolute sale of his estate ; that, while the proceedings were going on, he declared to several persons, that his only object was to obtain security for his debt, and that he would, at any time, accept principal and interest

The defendant admitted, that there had been a correspondence between him and the complainant, in relation to a settlement, but that, instead of being lulled into security by it, he had expressly informed him, that he should proceed against his St. Christophers estate—that he had informed the husband of the complainant's mother, that it was in his power to procure an absolute sale of the complainant's estate, and that he should do so, if this debt was not paid ; and urged him to become the purchaser, and pay the debt. He explicitly denied having told any one that his only object was to obtain security, and that he would, at any time, accept principal and interest—that all the proceedings had been in strict conformity to the law of the island. No part of the answer was materially impeached by the proof.

The defendant's correspondence with his agent in St. Christophers constituted a part of the proofs. And from that correspondence it appeared distinctly that the defendant's object was, not to obtain payment of, or security for his debt only, but to become the absolute purchaser of the West India estate.

The master of the rolls granted the relief prayed for. He thought the law of St. Christophers, which authorized the sale of an absentee's estate without actual notice of the proceedings, merely by leaving notice at his last place of residence. and posting another upon the door of the Court house, a very unwise and improvident one. But he admitted it to be the law, and that the defendant had a right to proceed under it, and he could not grant relief upon that ground. He ex-

presses his conviction that Lord Cranstown did not believe that his estate could be absolutely sold; but admits that this circumstance could not affect the defendant. He admits that the denial of the defendant that he ever said his only object was security, and that he would, at any time, take his principal and interest, must be taken as true, being contradicted only by a single witness; and does not put his relief upon that ground. He places it expressly upon the ground that, from the correspondence between the defendant and his agent, it was apparent that the defendant's object in the sale was, not only to obtain payment of his judgment, but to make *an advantageous purchase*. His language is this; "Upon the evidence, the case is clear of all doubt as to the transaction, and the object the defendant had in view in getting that judgment.(d) From the letters of June and September from the agent, it is clear the object of the defendant was, not only to obtain a sale to satisfy his judgment, but a sale at which he was to be the purchaser, upon such beneficial terms, that it would be worth his while to forego other prospects in life, viz. the settlement referred to in the East Indies. From the letter of the 13th November, from the agent, and the defence, I am to understand, that if 5s. had been given, it would be equally competent for him to insist that that should be the price, and that he had as good a right to keep it as he has now. Such a picture of a sale under a judgment so insisted upon, is such as I should not have thought could have been exhibited in a Court of Justice with a serious intention, supposing that any law of any country should be perverted to such a purpose."(e)

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(d) 3 Ves
Jun. 179.

(e) Id. 180,
181.

Again: "It has been argued very sensibly, that it is strange for this Court to say the sale is void by the laws of the Island or for want of notice. I admit I am bound to say, that according to those laws, a creditor may do this. To that law he has had recourse, and wishes to avail himself of it. The question is, whether an English Court will permit such an use to be made of the law of that Island, or any other country. *It is sold, not to satisfy the debt, but in order to get the estate*, which the law of that country never could intend, for a price much inadequate to the real value, and

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(f) Id. 182

(g) Id. 183.

to pay himself more than the debt, for which the suit was commenced, and for which only, the sale could be holden."(f)

The legality of the sale, if a third person had been the purchaser, is admitted by the master of the rolls, and that no relief could have been had against him.(g)

The act under which the sale took place was the act of 5 Geo. 2, ch. 7, which extended to all the English plantations. It was in force here from 1732, till the revolution.

The master of the rolls, I admit, lays considerable stress upon the unreasonable provision of the colonial act as to the service of process, and the mode of sale. But it is clear upon the face of the case, that striking out of it the evidence that Johnston's object in effecting the sale was, not only to obtain payment of his debt, but to purchase the estate, the relief could not and would not have been granted. It was put upon the ground, that his proceedings were a fraud upon the act, inasmuch as his object was to effect a purpose which it did not authorize or contemplate, under color of a proceeding which it did authorize. And does not this principle commend itself to all our feelings of natural justice and equity?

Legal act presumed to be done for legal purpose, unless contrary appear by positive proof or strongest circumstantial evidence.

But when it does appear, court will restrict operation to object which might legally have been accomplished.

Now can there be any difficulty in the application of this principle? A legal act will always be presumed to have been done for a legal purpose, unless the contrary is made to appear by positive proof, or the strongest circumstantial evidence. Every intendment shall be in favor of the act. But when it does appear to have been done for an illegal purpose, a Court of Equity will restrict its operation to the object which might legally have been accomplished by it.

The law is full of analogies in support of this principle. Upon what other ground is an action upon the case sustainable against a Sheriff for oppressively and maliciously executing process? The oppression and the malice in many, if not in most cases, consist in the motive with which an act, legal in itself, is done. Take the case of *Rogers v. Brewster*, (5 John. Rep. 125, and the cases there cited.) The process of the constable authorized him to take the horse of the plaintiff, as much as any other article of personal property. But the circumstances of the case showed that his motive in taking

the horse in preference to any other property, was, not to obtain payment of his execution in the most speedy and effectual manner, but to vex and oppress the plaintiff.

I shall not take up the time of the Court, in showing that the only legal purpose for which the execution in this case could be used, was to obtain satisfaction of the judgment upon which it was issued; nor in a recapitulation of the evidence to show, that, instead of being used for the purpose, it was used for the avowed and express purpose of enabling M'Donald to purchase the respondent's property at enormous and ruinous sacrifices; and if I have been successful in showing that the law would not have permitted him to have retained the property, but would have compelled him to restore it, or account for its value to the respondent; it necessarily follows, that the voluntary restoration of that which the law would thus have compelled him to restore, can form no consideration for the bond of the respondent.

But it may be said, that if Eddy should not be held to have been a party to the combination then the purchases made by him were legal, and the restoration of the property formed a portion of the consideration of the bond. The consideration for Eddy's portion was the respondent's note. It did not go into the bond; and if it had, M'Donald could not avail himself of it. The judgment and note of John Neilson, jun., and Boyce, who were both notoriously insolvent, it will not be pretended, formed a consideration sufficient to sustain the bond; and these are the only legal considerations beyond the debt due from the respondent, for which it is pretended the bond was given.

In this view of the case, therefore, I should be clearly of opinion, that the respondent's bond ought to stand as security only for the amount of M'Donald's judgment; and that upon payment of that, it ought to be given up and cancelled.

Nor have I been able to satisfy myself, that M'Donald has any equitable claim upon the respondent, for which the bond ought to stand as further security. If it were apparent upon the case, that the bond gave M'Donald no more than he was equitably entitled to from the respondent, the

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Object of execution to satisfy debt.

Voluntary restoration of what law will restore no consideration.

Restoration by Eddy, no part of consideration.

Bond, &c. should stand for replevin judgment only

M'D. has no equitable claim. If he had, security should stand for it

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(h) 9 Mod.
412. 1 Cas.
Ch. 97. *Proof*
v. *Hines*, Cas.
Temp. Talb.
111. *Gould* v.
Okefen, 3 Br.
Ch. Cas. 560.
Kenrick v.
Hudson, 6 Br.
P. C. 614.
Thornhill v.
Evans, 2 Atk.
330. *Ld.*
Cranston v.
Johnston, 3
Ves. jun. 170.

Court would undoubtedly direct it to stand, although it might have been improperly obtained; upon the familiar principle, that he who asks for equity shall do equity.(h) But then the appellant's equity ought to be perfectly clear and manifest, to induce the Court to impose terms upon the respondent, in a case circumstanced like this.

I shall not enter into a minute examination of the alleged grounds of the appellant, M'Donald's, equitable claims against the respondent. They relate to a raft of timber belonging to the son of the respondent, out of the proceeds of which M'Donald alleges he was to have received a portion of his debt against the son, and of which he was deprived through the agency of the respondent; and to a replevin suit, for certain goods and chattels belonging to the son, of which it is alleged the respondent had become fraudulently possessed, and a portion of which still remained in his hands. It is sufficient to say, in relation to these claims, that whatever may be the rights of M'Donald, he can assert those rights either at law or in equity; and that they are by no means so clear as to entitle him to call upon the Court in this summary and collateral manner to adjust and allow them.

The agree-
ment of son
that father
shall deduct
from his por-
tion, no consi-
deration.

Nor does the arrangement which is alleged to have been made between the respondent and his son, and sanctioned by the family, that the amount agreed to be paid by the father for the son, should be deducted from his inheritance, vary the case. The agreement of the son formed no consideration for that of the father. It was in his power to have deducted it without the consent of his son. He was under no moral or legal obligation to pay the debt, and the agreement to do this was most clearly not voluntary, but extorted from him.

Evidence not
sufficient to
charge Eddy;

I do not think the evidence sufficient to charge Eddy as a party to the combination. The principal circumstance which gives rise to suspicion against him, is the fact of his attending the sale prepared to pay his bids with specie. This certainly affords some reason for believing that he must have previously known that specie would be required in payment, and have been a party to the whole arrange-

ment; but it is not of sufficient weight to overbalance the positive denial in his answer.

As to the other appellants, the evidence of combination is overwhelming. The testimony of Hunter, as to the declaration of Griffeth, that he was afraid the respondent would return before the day of sale, and get the proceedings stayed, receives strong and ample confirmation from Griffeth's whole subsequent conduct, and from all the circumstances in the case. It is the first glimmering we discover of the spirit and object with which the proceedings were conducted; and makes him an accessory before the fact, to all the subsequent acts of violence and oppression. It is followed up by an abandonment of all official discretion; and an entire submission to the plaintiffs in the execution. Instead of acting as the minister of the law, and guarding its process against misapplication and abuse, he became the passive instrument of a party in the accomplishment of his illegal purposes. It was contended upon the argument, that he was not bound to incur the hazard of a suspension or adjournment of the sale, and that the law will not inquire into the extent of the hazard. Is it indeed true, that the law will not exercise a supervision or control over the discretionary acts of its ministerial officers? That they are omnipotent and irresponsible in the exercise of the power entrusted to them? "It is a proposition," as was once said by Ld. Hardwicke, "too monstrous to be debated."

The law will make the most liberal intendment in favor of its ministerial officers, when acting within the limits of their authority; but it will not permit them to resort to the *ultima ratio*, when the legitimate object, which it is their duty to effect, can be accomplished by milder means. Has a Sheriff a right to load an unresisting debtor, who quietly submits to his authority, with bonds and fetters, to guard against an escape in carrying him from his home to a prison? and yet it is the most effectual way of preventing an escape.

It was the duty of Griffeth, under the circumstances of this case to have suspended or adjourned the sale; and his conduct throughout the whole of this transaction, deserves the severest reprehension.

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Neilsen.

But strong to
show combi-
nation among
others.

Law intends
in favor of its
ministerial of-
ficers; but
they should
use mildest
means.

Sheriff should
adjourn sale
under *f. fa.*
to prevent
great sacri-
fices.

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It is due to the appellant, M'Donald, to say, what is apparent on the face of this case, that he entertained a sincere and strong conviction, that the respondent had aided his son in defrauding him out of a large and just demand; and tho' this belief, unsupported as it is by proof, does not alter the legal, it does most essentially change the moral character of his conduct.

Livingston
and Griffith
competent witnesses.

The only question that remains, is as to the competency of Livingston and Griffith, as witnesses. No relief is prayed against them. Whether a decree can pass against them, for costs only, seems to be questionable. But, admitting that it may, it is still but a contingent liability. A certain liability for costs is undoubtedly an interest which will render a witness incompetent. But, upon the authority of *Man v. Ward*, (2 Atk. 228;) *Cotton v. Luttrell*, (1 Atk. 451;) and *Beebe v. The Bank of New York*, (1 John. Rep. 556;) I think these witnesses were competent, and that the objection went merely to their credibility.

The decree
should be affirmed as to
M'Donald, but
modified.

I am accordingly of opinion, upon the whole case, that the decree of the Chancellor, as it respects the appellant M'Donald, ought to be affirmed, with this modification: that the respondent, in addition to the note and judgment, which he is directed to re-assign and deliver to M'Donald, also deliver to him the instrument by which that note and that judgment were assigned to him, the respondent, by M'Donald; to the intent that the general release which it contains, on the part of M'Donald, of all demands against the respondent, may be cancelled: and that so much of his Honor the Chancellor's decree, as relates to the appellant, Seth Eddy, be reversed.

And decree
as to Eddy reversed.

HUNTER, KING, LEFFERTS, LYNDE, MALLORY, OGDEN, STRANAHAN, SUDAM and THORN, Senators, concurred.

The principal
facts stated,
upon which
the appellants
claimed that
the decree of
the court of
chancery
should be re-
versed.

SAVAGE, Ch. J. The facts, in this case, which appear to me material, are as follows: In the month of September, 1815, M'Donald sold goods to the respondent's son, John Neilson, jun., amounting to \$2100. On the 10th March, 1816, J. Neilson, jun., gave a note for \$711 25, and on the 14th of the same month another note of \$1393 82, both pay-

able to Jacob Boyce, or order, in 90 days, and endorsed by Boyce to M'Donald. On the 16th of the same month, J. Neilson, jun., and M'Donald, entered into a written contract by which it was stated that M'Donald had bought 250 sticks of timber, (afterwards estimated at \$800, but which really produced but \$600,) to be delivered by J. Neilson, jun., in New York, and then paid for, at the New York prices, by being endorsed on M'Donald's notes—the balance to be refunded to J. Neilson, jun., if the notes were thus overpaid. The timber was sent to New York, by one Samuel Hewitt, who proceeded to that place in company with the respondent. When the timber arrived at New York, M'Donald demanded it, but the respondent told Hewitt he had no right to deliver it. The respondent did not promise to indemnify Hewitt against the consequences of non-delivery, but Hewitt understood him that he (H.) should not be injured. The respondent said M'Donald's debt should be the last his (the respondent's) son should pay. Hewitt refused to deliver the timber, and M'Donald sued him for it. Hewitt gave himself no concern about the suit—the respondent defended it, and M'Donald failed in his action, on the ground that the contract between him and J. Neilson, jun., was executory, and did not transfer to M'Donald the title in the timber.

M'Donald sued J. Neilson, jun., on the large note, and obtained a judgment, which was docketed May 15th, 1818, and on the 19th of June following, a *fi. fa.* thereon was levied upon the personal property of J. Neilson, jun., in his possession, nearly all of which the respondent appeared and claimed, saying he had purchased it at a Sheriff's sale, upon an execution in favor of Rockwell & Stebbins. The Deputy Sheriff who levied, Franklin Livingston, one of the appellants, advertised the property for sale on the 8th of July, 1818, on which day the respondent brought replevin against M'Donald and Livingston, for a part of the goods, worth about \$601. The value of those included in the declaration in replevin was only \$365 31. On the trial, a verdict passed for the defendants in the suit, M'Donald & Livingston, on the ground that the purchase by the respondent, under the

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Rockwell & Stebbins execution, was fraudulent, inasmuch as the respondent had agreed with his son to pay that execution out of the avails of the raft. On this trial, it also appeared that the respondent had no previous authority to intermeddle in the disposition of the raft, though his son afterwards approved of his acts.

A judgment was entered upon this verdict and an execution issued for \$480 83, under which Griffeth, as Deputy Sheriff, advertised the respondent's personal property for sale on the 22d Nov. 1819, at 9 A. M. [*Here the CH. JUSTICE adverted to the proceedings preparatory to, and attending the sale, as above stated by SUTHERLAND and WOODWORTH, Js.*]

The sale was proceeding, when the respondent, by the advice of his friends, proposed to compromise with the plaintiff, who offered to take \$2500, in discharge of all his claims against both father and son. This proposal was finally acceded to, and the amount was secured by the bond and mortgage, in question, after consultation with his family and friends, among whom an arrangement was made by which the sum secured was to be deducted out of the share which J. Nelson, jun., was to receive from the respondent's property, as a son's portion.

M'Donald, on receiving the bond and mortgage, joined with Livingston in releasing the judgment and execution obtained in the replevin suit. He transferred to the respondent the notes of \$711 25, against J. Neilson, jun., endorsed by Boyce, and assigned his judgment against J. Neilson, jun., and executed a general release of all demands against both the Neilsons. The bond and mortgage were payable in five equal annual instalments, with interest.

When the first instalment became due M'Donald brought a suit upon the bond; and then, and not till then, the respondent filed his bill in the Court of Chancery for relief.

In the meantime, J. Neilson, jun., had obtained the discharge of his person under the insolvent act.

There are some other circumstances, which I shall notice hereafter.

The question first in order, relates to the competency of two of the defendants in the Court below, (Griffeth and Livingston,) as witnesses.

On the point, whether a defendant, who is charged with fraud, but against whom nothing specific is prayed, may be examined as a witness for his co-defendants, the decisions in the English Courts are certainly somewhat contradictory; but it seems to me that the weight of the later authorities is in favor of their admissibility. (1 Phil. Ev. 2d Am. ed. 63. *Fenton v. Hughes*, 7 Ves. 287. *Dunham v. Corporation of Chippenham*, 14 Ves. 251. *Whitworth v. Davis*, 1 Ves. & Bea. 548, 551.) The inclination, in our Courts, has been "to confine the question of interest within strict and precise boundaries, and to let objections go more to the credit than to the competency of witnesses," (*Bebee et al. v. Bank of New York*, 1 John. Rep. 577,) and to admit the testimony of such defendants, permitting all objections to be made to their credibility rather than their competency. (*Kirk v. Hodgson et al.*, 1 John. Ch. Rep. 550.)

In my judgment, the Chancellor decided correctly in receiving the testimony of Griffeth and Livingston.

The other points, which appear to deserve consideration, are, 1. The regularity of the proceedings under the execution. 2. The validity of the bond and mortgage. 3. If the proceedings were irregular, whether the relief decreed by the Chancellor should be granted, under the circumstances of this case.

1. The Sheriff must obey his writ. It is his duty, therefore, on a *fi. fa.* to collect the money by the return day. He must not show favor, or give unreasonable delay, neither should he be guilty of oppression, or use more severity than is necessary. (Bac. Abr. Sheriff, (N.) Dalt. Sheriff, 109, 110.)

In this case, the execution was delivered to him on the 10th November, 1819, returnable at the next January term. He levied on the 13th Nov. and advertised the property for sale on the 22d. The respondent was absent when the levy was made, and returned the evening before the sale. On the morning of the 22d, he requested a postponement of the

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A defendant charged with fraud, but against whom no particular relief is prayed, may be a witness.

Objection goes to credit.

G. & L. good witnesses.

Other questions.

Sheriff must obey *fi. fa.* and collect money by return day; not show favor or be more severe than necessary.

When *fi. fa.* delivered, and how executed.

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sale, to which Griffeth answered, he should obey the instructions of M'Donald. He requested M'Donald to agree to the postponement, which he refused. I incline to credit this statement of facts, rather than the relation of J. Neilson, jun. M'Donald told the deputy that he should demand specie of the Sheriff, and the deputy then gave notice that he should require it from the purchasers.

It is not at all surprising that M'Donald should have been willing to distress the respondent. Smarting under the losses, disappointments, and perplexities he had suffered, resulting, as he supposed, from the wanton and malicious officiousness of the respondent, he, no doubt, felt gratified with the prospect of receiving remuneration and inflicting punishment upon him. The Sheriff, however, ought not to lend himself to any one, and thus become the instrument of gratifying the vindictive feelings of an exasperated party. I am rather inclined to believe, that, in this instance, the deputy acted under an impression that he was bound to obey M'Donald's instructions. In this he was mistaken. He was bound to exercise a proper discretion, and when he saw that there must be a great sacrifice of the respondent's property, it was his duty to have postponed the sale. (*Tinkom v. Purdy*, 5 John. Rep. 345.) A reasonable time should have been given the respondent to obtain the money, particularly when the Sheriff could not possibly sustain any loss from the indulgence.

Sheriff not to obey party if it will produce a great sacrifice; should postpone sale where plaintiff cannot sustain injury by delay.

No combination.

Evidence on this point.

I cannot, however, believe that there was that combination or concert between the appellants, which is supposed. M'Donald and Livingston were parties to the execution, and it would have been strange if there had not been concert between them. Griffeth had, several days before, informed a son of the respondent that he should not postpone the sale without M'Donald's direction. He told Hunter that he intended to sell as soon as the law would permit; and was afraid the respondent would return and pay the money. This conversation was voluntarily on the part of Griffeth, and certainly not calculated to further M'Donald's views. The natural consequence of making a public disclosure of what M'Donald must have wished to be kept secret, would be to

defeat the object, by giving the opposite party notice, and, therefore, enabling him to guard against it, by preparing to pay the money.

The principal circumstance relied on to prove combination on the part of Eddy is, his going to the sale with specie in his pocket, and offering to lend it to the respondent on condition of his securing to him 50 dollars due to him from J. Neilson, junior. This fact, to my mind, is conclusive evidence of Eddy's innocence. He went to the sale with the expectation of making advantageous bargains, to indemnify himself for a loss sustained, as he alleges, through the respondent's instrumentality. What inducement can any man have to attend a Sheriff's sale, or an auction, but to make advantageous purchases? What more natural than a desire to secure a bad debt, under such circumstances? The only feature about Eddy's conduct, which seems extraordinary is, that he was willing to loan the specie to the respondent on any terms; and it can only be accounted for on the supposition that he was fearful he might not otherwise attain his object. Had the respondent accepted his offer, M'Donald's views would have been entirely defeated; and yet this offer is urged as proof of Eddy's combination!

In conducting the sale, the deputy seems to have acted with ordinary indulgence and prudence, but he certainly erred in refusing the postponement: And were this the only question in the cause, I should certainly not hesitate in saying that the sale should be set aside.

2. The sale being considered irregular, it would seem to follow that the bond and mortgage, being a consequence of the sale, must be considered as improperly obtained, and be set aside either totally or partially. In this case, however, there are considerations which have brought my mind to a different conclusion.

The opinion of his Honor, the Chancellor, on this point, is in accordance with former decisions; which are, that, although the security may have been unduly obtained, yet it shall stand for what was truly due at the time. I can see no reason for limiting this doctrine to such claims as are *legally* due. Why do parties go into Chancery but for ob-

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Eddy offered to loan specie for \$50.

Deputy erred in refusing to postpone.

Though security may have been unduly obtained, yet it shall stand for what is legally or equitably due at the time.

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v.
Neilson.

Respondent's
frauds.

Offer to com-
promise, ad-
vised by
friends and
counsel.

Family ar-
rangement

taining what a Court of law cannot give them? The security ought to stand for what in equity and good conscience the party is entitled to receive. "Courts of Equity never interfere to deprive the plaintiff at law of any legal advantage which he may have gained, unless the party seeking relief will do complete justice, by paying what is really due. Indeed, they have (upon the same principle) gone so far as to refuse their assistance in relieving against a judgment obtained by fraud." (*Payne v. Dudley*, 1 Wash. Rep. 199. *Small v. Brackley*, 2 Vern. 602.)

The respondent in this case, had, by his improper and wanton interference with the raft which M'Donald had purchased and paid for, occasioned a loss to him of from 600 to 800 dollars, besides all the costs and expenses which he sustained.

He had again, by a fraudulent purchase of the property of John Neilson, jun., taken out of the possession of M'Donald, property worth, at least, 600 dollars, a part of which, only was included in the replevin suit. It appears, also, that a negotiation had previously been on foot, between, the respondent and M'Donald, for the sale and purchase of the demands which the latter held against J. Neilson, jun.; and it also appears, that the offer to compromise at the sale, proceeded from the respondent, was entered into by the advice of friends and counsel, and under a full knowledge of his rights. (1 Mad. Ch. 215.) It is said, indeed, that he was apprehensive, from M'Donald's circumstances, that the property, if taken away, would not be obtained again; but surely there was no ground to apprehend that both the Sheriff and his deputy were insolvent. He had his remedy against the officer, as well as against the party. Although I cannot approve the conduct of M'Donald or the deputy, yet it is not to be denied, that the respondent had provoked the treatment he received. He had deliberately executed the bond and mortgage, under the circumstances just mentioned, and also had, by a family arrangement, placed the amount to the debit of his son, the original debtor.

In the research which I have been able to make, I find no case which goes the length of setting aside a convey-

ance made under such circumstances. If done at all, it should be on completely indemnifying M'Donald, for the value of the raft, the goods replevied, and a liberal allowance for the costs and expenses of a three year's litigation.

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3. This brings me to the consideration of the relief, if any, which should be granted.

There is no doubt that the Court of Chancery has power to grant relief against deeds and judgments, not only when obtained by fraud or imposition, (*Reigal v. Wood*, 1 John. Ch. Rep. 406, and cases there cited,) but also when regularly obtained, if there are circumstances of extraordinary hardship, or great inadequacy of consideration. (*Ld. Cranston v. Johnston*, 3 Ves. Jan. 170.) The party asking equity must, however, do equity. He must come into Court with clean hands, unspotted with the foul stains of fraud and chicanery. In the present instance, the respondent came with an ill grace into a Court of Equity, to ask redress against grievances which were the consequences of his own misconduct. Besides, he slept upon his rights (if any he had) until his son, the original debtor, had obtained a discharge, exempting his person from imprisonment. He had before got possession of all his son's property; and the only remedy which M'Donald had to enforce collection of what is admitted to be an honest debt, is now taken away from him. If the bond and mortgage should be cancelled at all on any terms, it should only be done partially, allowing so much to remain as would be equal to the equitable claims of M'Donald; and also upon restoring him to all the rights which he possessed anterior to the execution of those securities. The latter condition cannot now be complied with. The release to J. Neilson, jun. cannot be cancelled without instituting proceedings against him; neither can his exemption from imprisonment be taken from him.

When chancery may relieve against deeds and judgments.

Parties cannot be reinstated, J. Neilson, jr a necessary party.

On the whole, therefore, I am of opinion, that the bond and mortgage given by the defendant, should not be cancelled. Although the conduct of M'Donald and the deputy cannot be justified, yet as between the parties in interest, there was a sufficient consideration.

Sufficient consideration.

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v.
Neilson.

1. Demands
assigned ;
2. Respon-
dent released.

3. Son re-
leased.

4. Securities
executed to
settle legal
controversy,
with know-
ledge of rights,
and advice,
&c.

5. Arrange-
ment reasona-
ble

1. Demands were assigned to the respondent amounting nominally, to more than the bond and mortgage : demands which he had previously proposed to purchase, at five shillings on the pound. He now gave less than twenty shillings.

2. He was released from all liability to M'Donald, which, upon equitable grounds, amounted to from fourteen to sixteen hundred dollars, besides costs and expenses.

3. The respondent's son was released from a debt admitted to be honestly due, amounting to considerable more than the amount of the bond and mortgage.

4. The securities were executed to settle a legal controversy. The respondent knew his rights, and that he had a remedy against responsible persons. He had the benefit of counsel, and the advice of his family and friends.

5. And under all circumstances, the arrangement was reasonable in itself.

My opinion, therefore, is, that the decree of his Honor, the Chancellor, be reversed.

BOWKER, BOWNE, BRONSON, BURT, CLARK, CRAMER, DUDLEY, EARLL, EASON, GREEN, HATHAWAY, M'INTYRE, REDFIELD. WHEELER, and WOOSTER, *Senators*, concurred.

For affirm-
ance in part,
11 ; for rever-
sal, 16.

A majority of the Court being for a reversal, it was there-
upon ORDERED, ADJUDGED and DECREED, that the decree
of the Court of Chancery, made in this cause, be reversed ;
that the respondent's bill be dismissed, without costs to
either party, as against the other ; and that the injunc-
tion, issued in this cause, be dissolved ; and that the record
and proceedings be remitted, &c.

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SARAH WILSON and others, appellants,
against
ROBERT TROUP and others, respondents.

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v.
Troup.

It seems, that an appeal from a final decree brings up an interlocutory order suppressing certain depositions, which may bear upon the final decree.

A power of attorney to execute a mortgage, authorizes the attorney to insert in the mortgage a power of sale, on default of payment.

This does not alter the nature of the instrument, or give any greater security than is implied in the word *mortgage*.

The power to sell applies solely to the remedy; and impairs no right of the mortgagor.

A power to give a *mortgage* must be taken to mean the instrument in common use as a mortgage, where the power is to be executed.

Mortgages in this state generally include a power of sale, or summary foreclosure;

And a power by a citizen of Pennsylvania to execute a mortgage in this state, implies an authority to insert a power of sale, &c.

It is not necessary to the validity of a mortgage, or a purchase under a power of sale therein, even as against subsequent purchasers, &c., that the power to execute it should be registered according to the statute, (1 R. L. 373, s. 2.)

This is not necessary as against the mortgagor.

The provision that the power of sale shall be recorded before a conveyance under it shall be executed (sess. 36, ch. 32, s. 6, 1 R. L. 374,) is for the benefit of the purchaser; and was intended to protect him against subsequent purchasers, &c.

But it does not lie with the mortgagor to object, that a sale and conveyance have been made under the power, without its having been recorded.

It was conceded by the court, that the registry of a power, the proof or acknowledgment of which was taken out of this state, though before a commissioner resident here, is a nullity.

A mortgagee, though he have conveyed the whole mortgaged premises with warranty in fee, can yet foreclose; for this conveyance of the land will not pass his interest in the mortgage.

So if he have thus conveyed only a part of the mortgaged premises, he may yet foreclose for the whole under a power of sale in the mortgage; and may himself become the purchaser.

Whether a mortgagee, having assigned part of his interest in the mortgage, may foreclose under a power of sale in his own name, or must give notice in the name of himself and his assignees? *Quere.*

Though the mortgagee convey in fee a part of the mortgaged premises, this does not prejudice the right of the mortgagor to redeem.

A statute foreclosure of a mortgage is equivalent to a foreclosure in equity. If a mortgagee convey a part of the mortgaged premises with warranty,

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v.
Troup.

and afterwards himself purchase the whole under the power of sale, the purchase will enure to the benefit of his grantee.

The power to execute an instrument of known and definite signification in the law, will not authorize the execution of one having a different effect: Thus, a power to convey does not authorize the attorney to insert in the conveyance a covenant of seisin.

In the construction of all contracts, the situation of the parties, and the subject matter of the contract are to be considered, in order to determine the meaning of any particular provision.

This rule applied.

A mortgagor is deemed seised as to all persons except the mortgagee, &c. Both at law and in equity, a mortgage is considered a mere security for money:

The interest of the mortgagee is a chattel merely;

And will pass by delivery without writing.

A mortgage is a mere incident to the debt;

And an assignment of the interest in the land without the debt is a nullity.

A mortgage is good without a power of sale.

The words even of a naked power are not always confined to what they necessarily import in their strictest legal sense;

But they are to be construed according to the intent of the parties.

This rule considered upon authority;

And applied.

The nature of a power of sale in a mortgage considered.

It is a power coupled with an interest.

It seems, it is a power appendant, and not in gross.

The distinction between powers appendant and in gross.

The first is where the donee of the power has an estate in the lands; and the estate to be created by the power does, or may take effect in possession, during the continuance of the estate to which the power is annexed;

As a power to a tenant for life, in possession, to make leases.

The latter is where the donee of the power has an estate in the lands; but the estate to be created under the power is not to take effect till the determination of the estate to which it relates.

If the donee of a power appendant and coupled with an interest (as a mortgagee) convey his whole estate, this would pass, but not extinguish the power.

This is the common case of the assignment of a mortgage;

Which carries not only the legal estate, but all the remedies or powers attached to it.

But a conveyance of part of the estate will not carry with it a corresponding portion of the power;

Because the power is indivisible.

It can operate but once, and then is exhausted.

A trustee may purchase for the exclusive benefit of his cestuy que trust.

And if he purchase for his own benefit, it is good until set aside by the cestuy que trust, who alone has a right to object.

It seems, that communications made to an attorney at law, by one who has retained him to conduct a foreclosure by advertisement, under the act

concerning mortgages, such communications having relation to the business of the foreclosure, are to be considered as confidential communications between attorney and client; and therefore inadmissible in evidence against the client.

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Wilson
v.
Troup.

APPEAL from the Court of Chancery. William Wilson, the father of the appellants, late of Northumberland, in Pennsylvania, deceased, held an interest in a contract with one Charles Williamson, for 6000 acres of land in Steuben and Ontario counties, which Williamson was to convey for the consideration of £795, New York currency. Oct. 6, 1796, Wilson gave a power of attorney to Daniel Faulkner, to receive a conveyance, with warranty, and execute bonds and mortgages to Williamson, and do and perform all things necessary and lawful to secure the purchase money. Oct. 21, 1796, Faulkner received the deed, and executed a bond and mortgage accordingly. *This mortgage included a special power to the mortgagee, &c., to sell the land and raise the money due on default of the mortgagor, &c., to pay according to the bond,* (which, by our statutes, 2 Greenleaf, 101, act of 26th Feb. 1788, 1 K. & R. 482—re-enactment, 6th April, 1801, and 1 R. L. by Woodworth & Van Ness, 373, s. 5, gives the mortgagee, his assigns, &c., the right of summary foreclosure, without a bill in equity.) The mortgage, but not the power to Faulkner, was registered in the Clerk's office of Steuben County, Oct. 24, 1796.

Williamson assigned this mortgage to Sir William Pultney, who died intestate in 1805, leaving Henrietta Laura Pultney, Countess of Bath, (wife of Sir James Pultney,) his only child and heir at law. She died in July, 1808, intestate as to her real estate, which descended to Sir John Lowther Johnstone, her son and heir at law.

On the death of Sir William Pultney, the respondent. Robert Troup, took out letters of administration of his estate.

From 1806, to May, 1811, the respondent, Troup, as agent successively of Sir William Pultney and Johnstone, sold and conveyed divers parcels of the mortgaged premises to eleven of the other respondents.

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Notwithstanding these sales, Troup, as administrator of Sir William Pultney, Oct. 16, 1810, advertised the mortgaged premises for sale, under the power in the mortgage, and April, 1811, sold them to Samuel S. Haight, the highest bidder, at \$350, who bought at the request of Troup, and the same day conveyed the premises, for a nominal consideration, to Johnstone and his wife.

Haight was an attorney at law, and under the direction of Troup, aided in conducting the foreclosure. He was examined as a witness below, to impeach the proceedings, and one question was, whether he was admissible.

The power of sale was proved by a subscribing witness, before a Master in Chancery of this state, but who went into Pennsylvania to take the proof, Nov. 20, 1809, and registered Dec. 13, 1809. This error was not discovered till after the sale, when on the 8th June, 1812, the power was regularly proved, and on the 11th June, duly recorded.

William Wilson died intestate, A. D. 1813, and the appellants are his heirs at law.

Since the sale at auction, in 1811, Troup, as agent of the Pultney estate, had gone on selling different parcels of the mortgaged premises, &c., till on the 25th Sept. 1820, the appellants filed their bill to redeem, and for an account, &c.

The bill also charged unfairness and fraud in conducting the sale under the power. The facts bearing upon this question, with the other additional facts which it is deemed material to notice, are sufficiently stated in the opinions of the Judges, and by the Chancellor in giving the reasons of his decree, which was, to dismiss the bill without costs.

The reasons for this decree were assigned as follows, by

The late CHANCELLOR KENT. The great and leading point in the case is, whether the sale of the mortgaged premises, under the power contained in the mortgage, was duly made, under a competent power.

If this point be determined in favor of the sale, it will be unnecessary to examine whether there was any sufficient ground to consider Wilson as having abandoned or waived by his acts and his acquiescence, prior to the sale, his equity

of redemption, in the mortgaged premises, so as to have concluded himself and his representatives from a right to redeem.

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The letter of attorney authorized Faulkner, for Wilson, and in his name, to ask, demand, and receive of Williamson deeds for the premises, and to sign, seal, deliver and acknowledge, a *mortgage or mortgages, &c., bonds to the amount of the consideration money remaining due, for the better securing of the same according to an agreement thereof between them made*, and granting to his said attorney full power and authority *to do and perform all things necessary and lawful* to the obtaining to him and for his use, a title, &c., and *securing the consideration money therefor to the aforesaid Charles Williamson.*

Under this power a deed was received by Faulkner, from Williamson to Wilson, and a mortgage simultaneously and of the same date, (being the 21st October, 1796,) executed by Faulkner, for and in the name of Wilson, to secure the amount of the consideration, including a rateable compensation for mills built upon the premises. This allowance for the mills, which increased the amount of the mortgage beyond the actual consideration in the deed, was in pursuance of an agreement between Williamson and Faulkner, who acted on behalf of all the parties in interest in the premises, and which agreement was alluded to in the letter of attorney. The mortgage was in the printed form used in the offices of the agency of the Pultney estate, and it contained the usual power to sell on default of payment, and which power had been invariably inserted in all the mortgages taken by the Pultney agent. A power to mortgage would seem to include in it a power to authorize the mortgagee to sell on default of payment, because the power to sell is one of the customary and lawful remedies given to the mortgagee. It is a power which has been repeatedly regulated by statute, and is therefore known to the law, and is in universal use. It has consequently become a power incident to the power to mortgage; and will, of course, be included in the power to mortgage, if there be nothing in the instrument conveying the power specially excluding it, and the party creating the power be competent in age to grant it.

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Courts of Equity look to the end and design of the parties, in considering the extent of powers, and to a substantial rather than to a literal execution of the power. On this principle, a power limited in terms has, in favor of the intention, been deemed a general power, and a general power in terms has been cut down to a particular purpose. Why should we not conclude that the parties in this case had in contemplation a mortgage in the usual sense of that security, with all the remedies then in use and recognized by law? It is very certain that the mortgagee meant a mortgage with a power to sell, because it was his invariable practice to take mortgages with such a power; and when he entered into a covenant with Faulkner and others, in 1795, to sell the land, *and take a good and sufficient bond and mortgage*, it is to be presumed that the same kind of mortgage was understood between the parties, which was afterwards executed by F. and accepted by W. under the power. It is equally reasonable to presume that Wilson, who created the power, from the proximity of his residence to the Pultney offices, his intimacy with Faulkner his attorney, and the general notoriety of the transactions of the agency of the Pultney lands, must have been acquainted with the practice of the Pultney agents in taking mortgages, and that he also meant a mortgage full and effectual, according to that practice, with all the customary remedies to enforce it.

A power to mortgage is a power to give the same security under that name, in as full and effectual a manner as the party himself, who created the power could give. The letter of attorney was general in its terms: It was to give "*a mortgage*," and "*to do and perform all things necessary and lawful for securing the consideration money*." If the power to sell was usually inserted in a mortgage, as an ordinary and lawful part of it, the attorney in this case had authority to insert it, under his general authority to mortgage, and to do what was necessary and lawful. Every thing incident to a mortgage, which Wilson himself could do, in and by the act of giving a mortgage, Faulkner could do under the power.

Powers are construed with this liberality, and to this extent.

In *Liefe v. Saltingstone*, (1 Mad. 189 ; 1 Freem. 149, 163, 176, S. C.) the testator devised his farm to his wife, for her natural life, and by her to be disposed of to such of his children as she should think fit. She conveyed the estate to her son, in fee, and the power was held well executed, even at law. The principle of the case was, that where *the donor gives to another a power to dispose, he gives to that person the same power that he himself had to dispose*. If the devise be that I. S. may sell my land, he may sell the inheritance.

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There is much force to be given to the validity of the power to sell, from a view of the doctrine touching leasing powers. If a tenant for life has power to grant leases "requiring the best improved rents," he may cause to be inserted in the leases the usual covenants for payment of the rents, and a clause of re-entry upon non-payment, though the power be silent as to any covenants of that kind. These incidental provisions are considered as implied in the power of leasing. Such provisions were deemed valid, though the lease was on other accounts much criticised in *Jones v. Verney*, (Willes' Rep. 169,) and the omission of them would be fatal under such a power, according to the opinion of Lord Mansfield, in *Taylor v. Horde*, (1 Burr. 125 ;) and to show the liberal construction of powers in equity, in furtherance of the end for which they were created, we may refer to the case of *Roberts v. Dixall*, (2 Eq. Cas. abr. 668, pl. 19,) in which a power to appoint and divide an estate, was held well executed by a charge of a sum of money upon it ; for though that was not within the direct terms of the power, yet Lord Hardwicke held it to be within the intent, and an execution of the power in substance. Again, in *Long v. Long*, (5 Ves. 445,) it was held, that a power to charge an estate with the payment of moneys for the benefit of the children, as he should think fit, would authorize a disposition of the estate itself. A power to charge included a power to sell, and Sir William Grant afterwards (6 Ves. 797) cited the case as establishing that point, and he seems to have sanctioned in *Bullock v. Fladgate*, (1 Ves. & Bea. 471,) such deviations

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from the letter of the power ; and though it is considered as a questionable point, whether a power to sell or exchange would authorize a partition of land, (*Abel v. Heathcote*, 2 Ves. Jun. 98, 4 Bro. 278, same case questioned in *M'Queen v. Farquhar*, 11 Ves. 467, and *Attorney General v. Hamilton*, 1 Madd. Rep. 214,) yet Mr. Sugden, (Tr. on Powers, 2 ed. 446, 449,) gives it as the result of the cases, that where a freehold interest is authorized to be appointed under a power, a different species of estate, less valuable, will be supported in equity. We surely cannot be departing from the spirit of all these cases, when we construe a power to mortgage, as involving in it a power, to add the ordinary and lawful remedies prescribed by law, upon breach of the condition of the mortgage. The remedies are the means for rendering the mortgage an effectual security for the debt. The statute foreclosure is cheaper and more simple, and generally more expeditious than a foreclosure by a bill in Chancery ; and it is always deemed a matter of some consequence by the mortgagee, that he should have such a remedy within his discretion. At so early a period as the date of the mortgage, when the practice of the Court of Chancery was quite limited and in very few hands, the authority to sell by act of the party must have been deemed of almost incalculable value. That power is still necessary to the completion and perfection of the security, because it affords the alternative remedy authorized by law. A power to mortgage does, therefore, very clearly in my view of the case, carry with it a power to authorize the mortgagee to foreclose by selling under the statute. The power intended a mortgage in the best manner that it could be made consistently with law, and as between the mortgagee and mortgagor, the equity of the case is, that the former should be deemed clothed with all the customary rights and privileges of a mortgagee, and more especially when it appears that this same mortgagee was in the invariable habit of taking mortgages in the form adopted in this case.

A different construction would make the mortgage operate most injuriously upon the mortgagee, and in the present instance, by unsettling titles, it would make immense

mischief. It may be observed, in aid of the construction I have adopted, that Wilson acquiesced, during his lifetime, in the execution of the power. He is presumed to have had early notice of the bonds and mortgage, and of the terms of them, and not one word of objection to the power was made by him, from October, 1796, to his death in 1814. It is with the appearance of great injustice, that his representatives should at this day attempt to set aside the sale upon such a pretext.

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If the power be admitted to have been inserted in the mortgage by power authority, it puts an end to the present claim. The sale was fairly made upon the due public notice required by law. This is very satisfactorily proved; and there is no ground for the charge of irregularity touching any part of the proceedings. Something was said upon the argument about fraud in the sale, but there is no such allegation in the bill, nor is it made a point in the case by the complainants' counsel. The charge is irregularity and want of authority, and there is nothing in the proofs to give countenance to the suggestion of fraud, had it even been made a substantial averment in the bill. The power to Faulkner to execute the mortgage is fully proved. It was recorded in 1809, and again in 1812, and the power contained in the mortgage was duly recorded as early as June, 1808.

There is not, then, any ground to impeach the title held under the sale. The mortgaged premises were purchased by S. S. Haight, on behalf of the proprietors of the Pultney estate, and the statute authorized the mortgagee or any person on his behalf, to purchase. The title thus acquired cannot, to use the words of the statute, "be defeated in favor of, or for the benefit of any person claiming the equity of redemption."

The only remaining pretence upon which the sale is to be defeated, is, that the defendants had previously conveyed a part of the premises in fee. These conveyances were made under the assumption, that Wilson had abandoned all claim to the equity of redemption, and the deed from Williamson to him, was in the possession of the Pultney agent. If that deed had been surrendered by Wilson, (and we cannot

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otherwise account for its being in possession of the mortgagee,) it affords very strong color for the inference that the right of redemption had been truly abandoned; and that inference is much strengthened by his long acquiescence in the possession taken, and acts exercised by the mortgagee as owner, and by the non-payment of any part of the principal and interest of the consideration, according to the contract. But I do not lay much stress upon this assumed fact of an abandonment of the equity of redemption, and I refer to it only as evidence of the good faith and sincerity with which acts of ownership over the property were exercised. On this point, however, we need not dwell, for the mortgagee afterwards treated the property as covered by a subsisting mortgage, and the equity of redemption was regularly foreclosed. The sales by the mortgagee could not, upon any reasonable principle, deprive him of the right of foreclosing the mortgage, nor could they prejudice the right of the mortgagor to redeem. If the mortgage was still subsisting, the purchasers under the mortgage took subject to the mortgage, and the right of redemption: a mortgagee before foreclosure, cannot even make a lease so as to bind the mortgagor when he comes to redeem. (*Hungerford v. Clay*, 9 Mod. 1.)

The suggestion that the mortgagee could not foreclose, because he had previously sold parcels of the land, is entirely without any foundation in precedent or justice. The sales created of themselves no obstacle to the right of redemption. If the mortgagor was entitled to redeem, he could recover the possession as against those purchasers, equally as well as he could recover it against the mortgagee himself, or his heirs after his death; a mortgagee cannot, by fine and non-claim, bar the equity of redemption. The fine displaces nothing. It is still the same estate, (Lord Redesdale, 1 Sch. and Lef. 380.) The same power that awarded the redemption, could award a restitution of possession. The argument on the part of the plaintiffs, would go to prove that a foreclosure by bill was equally barred, as a foreclosure by advertising under the statute. In both modes the mortgagor should come in before the sale,

and make his defence. He is presumed in law to have equal notice of the proceeding in each case, and a foreclosure and sale is as much a bar in the one case as in the other.

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A good deal was said upon the argument, touching the disclosure by Haight, of the confidential correspondence between him and Troup, during the time that he was employed to conduct the foreclosure. As I see nothing in that correspondence that applies to any part of the case, except the point of abandonment by Wilson, of the right to redeem, (and on which I have not thought it necessary to dwell,) the competency of this testimony becomes immaterial. But I ought not, perhaps, to let that question pass, since it has been discussed before me, and will probably be discussed again in this Court. A motion was made during the argument, to suppress these letters, and the question on their competency was reserved.

Haight was employed by Troup to foreclose the mortgage, and he says he believes that the business of conducting the foreclosure would not have been confided to him, if he had not been a lawyer. It was professional business, and in respect to that particular transaction, the parties appear to have stood in the relation of attorney and client, and the communications in the letters of Troup, prior to the sale, were upon every reasonable ground, entitled to the protection of that relation, as confidential communications. The voluntary disclosure of those letters relating to this subject to the adverse party, I consider as a reprehensible breach of trust, and which the right and privilege of the client require should not be permitted in a court of justice. The letters related also to other business respecting the general agency of the Pultney estate : but that circumstance does not affect the confidential communications relative to the particular business confided to him as attorney, nor destroy the confidence under which the law considers them as received. I should deem it a dangerous precedent, and one that would impair the good faith that ought to be observed, and which the public good and those valuable interests, which clients must confide to their counsel, require to be observed, to land

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the sanction of this Court, to the disclosures in question; those letters are therefore inadmissible as evidence in the cause.

My conclusion upon the case was, that the plaintiffs were not entitled to redeem, and I accordingly dismissed the bill without costs.

H. Bleecker, for the appellants, made the following points :

1. The abandonment set up by the defendants is in itself invalid, and could not be established by parol evidence.

2. The abandonment is disproved.

3. If such abandonment ever existed, it was waived by the subsequent proceedings on the part of the representatives of Sir William Pultney.

4. Daniel P. Faulkner, who executed the mortgage as William Wilson's attorney, had no authority to insert therein a power of sale under the statute.

5. The power of attorney, under which the mortgage was made, was not legally recorded before the sale under the mortgage, the proof being taken out of the state.

6. The mortgagee or his assignees, having conveyed divers parts of the mortgaged premises in fee simple, with warranty, before the sale under the power, could not proceed to sell or buy under the power.

7. At any rate, the sale in this case was void, it not having been made for the purpose of collecting the money due on the bond.

8. The complainants are entitled to redeem the mortgaged premises, and to be restored to the same, on payment of the mortgage money, as if it had been paid when due.

9. But if it shall be decided, that any part of the mortgaged premises is held by *bona fide* purchasers, not affected by notice, the complainants ought to have a decree for the purchase money, or the present value of the premises, at their election, allowed to them in extinguishment of the mortgage.

10. After the mortgage shall be thus extinguished, the complainants ought to be allowed, as to the remaining premises in the hands of such *bona fide* purchasers, to have

their portion of the securities for the purchase money, or a decree that the present value of their share of such premises be paid to them by the representatives of Sir William Pultney.

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1, 2, 3. As to the abandonment. Wilson had purchased and given a mortgage. This gave him a full and perfect title to every purpose, except that of securing the debt.(a) He owned an estate which might descend or be devised;(b) it was subject to execution;(c) and he might even have maintained trespass against the mortgagor. His estate could not be passed from him without a technical conveyance; for both at law and in equity, the freehold is deemed to be in the mortgagor, the mortgagee retaining a mere chattel interest.(d) The right to redeem is protected with the greatest jealousy, and every clause in its derogation is holden to be void.(e) Even cancelling the deed does not divest a title.(f) Yet it is claimed to overturn these well settled doctrines in relation to the real property, by parol proof(g) of an abandonment, or rather by mere inference, for there is no positive evidence of abandonment. Is a man to be deprived of his title to real estate in this manner? Possession continuing in the mortgagee cannot operate as evidence of an abandonment. He has a right to such possession the moment that the mortgage is executed, subject, indeed, to be defeated by a payment of the money. The only difference between this and the ordinary case is, that he must account for rents and profits. True, it is common for the mortgagor to retain possession, but this is not always the case, and even if he be in possession, the mortgagee may give notice to his under tenants, and claim and enforce a payment of rent from them.

(a) 18 John 114.

(b) 1 Pow. on Mort. 338.

(c) *Waters et al. v. Stewart*, 1 Caines' Cas. Err. 47.

(d) *Stanard v. Eldridge*, 16 John. Rep. 254.

Hitchcock et ux. v. Harrington, 6 id. 290. *Jackson v. Willard*, 4 id. 41. *Runyan v. Mercereau*, 11 id. 534.

(e) 1 Pow. on Mort. 146. 2 Atk. 495.

Willet v. Winnell, 1 Vern. 488.

(f) 2 H. Bl. 263.

(g) *Jackson v. Carey*, 16 John. 302.

Same v. Shearman, 6 id. 19. 1 Ves. sen. 253.

Haight's evidence shows unfairness in the proceedings to foreclose. He was clearly admissible, for he was not acting in the character of an attorney at law, but a mere private agent. No suit was pending.

M. Van Buren, for the appellant, submitted whether this question could be gone into upon the appeal, which was confined to the decree of dismissal. The order suppressing

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Haight's deposition was distinct. It was entered after the final decree which was January 20th, 1823; and the order of suppression, February 26, 1823, recites that it was not entered at the time of the final decree, and it is ordered to stand *nunc pro tunc* as of January 20th.

WOODWORTH, J. The amount of it is, then, that both decrees were made January 20th, but the order of suppression was, by mistake, not entered.

Van Buren, said the order of suppression was first made, but, by mistake, not entered. It was, after the final decree, entered as of the same date with the latter. But the two decrees are distinct. He read from the petition of appeal which was from the final decree only.

Semb. appeal from final decree brings up an interlocutory order suppressing depositions, which may bear upon the final decree.

SUTHERLAND, J. Does not the appeal from the final decree involve every interlocutory decree bearing upon it?

Bleecker. It has been so decided by this Court over and over again.

WOODWORTH, J. I think the question as to Haight's competency may be considered one on which the final decree turned. The order suppressing his evidence, is, in this point of view, brought up with the final decree.^(h)

^(h) Vid. Atkinson v. Manks, 1 Cowen's Rep. 702, and the cases there cited. S. P.

⁽ⁱ⁾ Peak. Ev. 117, n. (B.) ed. 1804.

^(j) 1 id. 129.

Bleecker. The parties have a right to the evidence of agents, from the necessity of the case.⁽ⁱ⁾ Peake, in his Treatise on Evidence, shows the extent of the privilege claimed by the respondents. He says,^(j) that, "In like manner as the law respects the peace of men, it considers the confidential communications made for the purpose of defence in a court of justice. By permitting a man to entrust his cause in the hands of a third person, it establishes a confidence and trust between the client and the person so employed. A counsel, solicitor, or attorney cannot conduct the cause of his client, if he is not fully instructed in the circumstances attending it: but the client could not give the instructions with safety, if the facts confided to his advocate were to be disclosed. Barristers and attorneys, therefore,

to whom facts are related professionally, during a cause, or in contemplation of it, are neither obliged nor permitted, though they should so far forget their duty as to be willing to do so, to disclose the facts so divulged during the pendency of that cause or at any future time." The privilege is thus confined to professional employment, properly so called. Is a man, merely employed to put up an advertisement, an incompetent witness, because he happens to be an attorney at law? Or suppose him to be a land agent, shall his testimony for that reason be excluded? No. The communication must relate to a judicial proceeding. Is the sale of mortgaged premises under the statute, upon simple advertisement, such a proceeding? There is neither Court, parties, suit, process, nor record. It is no more judicial than advertising a cargo of rum. True, the effect is a foreclosure. So a sale of my land divests my title, but the sale is not, therefore, a judicial proceeding. (He examined H.'s evidence, but as this was not deemed material by the Court, it need not be noticed here.)

If there was an abandonment, it was waived by the subsequent attempt to foreclose. But,

4. The foreclosure and sale was a mere formality, and utterly void, and without effect. Faulkner had no authority to insert the power of sale in the mortgage. A letter of attorney, to make a mortgage, does not imply an authority to insert a power of sale; for a mortgage is complete without this. This power of sale and summary foreclosure was unknown to the common law, and is, to this day, without a precedent in England.^(k) The Chancellor seems to rely on the practice at the Pultney land office,^(l) but surely it requires no argument to show that this is not to form the law of the case. The question is the same as if it was the first mortgage ever taken in this form.

The general principle is, that an authority should be strictly pursued. This rule is laid down and illustrated by the cases cited in Com. Digest.^(m) The power of sale does not pertain to the nature of a mortgage, and when first introduced with us, this power was contained in a distinct instrument. Reliance is placed by the Chancellor on the

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(k) 2 Pow. on Mort. 1093.
1 id. 14 to 20.
Croft v. Powell et al., Com. Rep. 603. 10 John. 196, per Kent, Ch. J. But see the late case of *Clay et al. v. Willis*, 1 Barn. & Cress. 364.
(l) Ante, 200.
(m) Attorney, (C.) 10, 11.

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(n) Ante, 199.

(o) *Martini*
v. *Coles et al.*,
1 M. & S. 140.
(p) *Nixon*
v. *Hyserott*, 5
John. Rep. 58.
Gibson v. Colt
et al., 7 id. 390.

(q) 5 John.
59

(r) Ante, 201.

(s) Ante, id.

(t) Ante, id.

(u) Ante, id.
from 6 Ves.
797.

(v) Ante,
201, 2.

(w) Sug. on
Pow. 2 ed. 446,
449.

general words, "to do and perform all things necessary and lawful for securing the consideration money." (n) But these words were not meant to extend the power beyond a bond and mortgage, as such. They might as well be construed to authorize any personal collateral security. These general words relate to the premises—the subject matter, which is a bond and mortgage. They are confined to what is lawful in furtherance of the power previously and specifically conferred, which, indeed, is a matter incident to the power without this clause. Thus it comes back to the nature of the authority. The right of inserting a power of sale was no more necessary to its execution, than the right to pledge is to a factor. The latter has a power to sell, but this does not include a power to pledge the goods of his principal. (o) A power to sell lands does not imply a power to insert covenants of seisin, warranty, &c. (p) This was decided upon a principle directly applicable here, that "a conveyance or assurance is good and perfect, without either warranty or personal covenants; and therefore they are not necessarily implied in a covenant to convey." (q) Now covenants are a much more striking requisite in a conveyance than a power in a mortgage; for if the bargainor is not seised, no estate passes. The case of *Liefe v. Saltingstone*, relied upon by the Chancellor, (r) turned upon a technical difficulty raised upon the word *dispose*. Nor is he borne out, by the decisions cited by him (s) in relation to leasing powers. In those cases, the attorney took the covenants, and who could object, or think of objecting to a covenant which he had executed with his own hand, because the attorney had no power to receive it? The attorney received a covenant highly beneficial to his principal; it was like an objection to the execution of a power to sell for 1000 dollars because the attorney sold for 2000 dollars. In *Roberts v. Dixall*, on which he also relies, (t) the attorney did less than what the power authorized, and the case proceeds upon the maxim that every greater includes the less. In the subsequent case of *Kenworthy v. Bate* cited by him, (u) the master of the rolls considered it so. The result of the subsequent cases to which he refers (v) as given by Mr. Sugden, (w) is the true distinction arising from all of them,

"that where a freehold interest is authorized to be appointed under a power, a different estate, less valuable, will be supported in equity."

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5. But if the power was operative, the validity of the sale depended upon this, as well as the power under which the mortgage was made, being recorded before the conveyance was executed. The latter it expressly required by the statute.^(x) The authority to foreclose is a special statute power, and must be strictly pursued.^(y) The subsequent act of recording will not make the execution of the power good by relation.^(z)

^(x) 1 R. L.
374.

^(y) *Denning*
v. *Smith*, 3
John. Ch. Cas
344, 5.

^(z) *Hawkins*
et al. v. *Kemp*,
3 East, 410.
Wright et al.
v. *Wakeford*,
4 Taunt. 213.
Doe v. Peach,
2 M. & S. 576.
Doe v. Pierce,
6 Taunt. 402.

^(a) *Bergen*
v. *Bennet*, 1
Caines' Cas.
Err. 15.

6. The nature of the mortgagee's interest, as connected with the power, is well defined, and has been very fully considered by this Court. The power is not a mere naked one, but coupled with an interest;^(a) and when Troup conveyed, the power was extinguished. If a mortgagee could convey the land, and yet reserve the power, he might defeat his own grant. The nature of an authority to convey real estate, is considered at large in Hargr. & Butl. note 298 to Co. Litt. 342 b. It is there said, that "those powers which are given to mere strangers, that is, to persons who were not owners of the land, at the execution of the instrument creating the power, and who do not take under it, either a present or future estate or interest in the land, are said to be *collateral* to the land:—Those which are reserved to the owner of the land, or to a person deriving under the instrument creating the power, either a present or future estate or interest in the land, are said to be relating to the land." The power in question was derived under the same instrument, is annexed to the estate, and, therefore, comes within the latter division of a power relating to the land. It is said in Powell on Powers, 26, that "An assignment of *totum statum suum*, or a total alteration of the estate for life, to which a power is appendant, destroys the power."^(b) So the conveyance by Troup passed *his whole estate*, in those parts of the mortgaged premises conveyed.^(c) There can be no doubt that Troup had the whole *legal* estate, which passed by his conveyance.^(d)

^(b) Hard.
416. 1 Ventr.
226. Sand on
Uses, 226.

^(c) Harg. &
Butl. note 298
to Co. Litt.
342 b.

^(d) *Jackson*
v. *Chase*, 2
John. Rep. 84.
Sanders' note,
(1) to 1 Atk.
605. *Jackson*
v. *Delancy*, 13
John. 539.
Butler's note
96 to Co. Litt.
205 a. *Sir*
Thomas Lit-
leton's case, 2
Ventr. 351.

Van Buren. We shall not dispute that the legal estate passed.

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(e) Vid. 2
Bl. Com. 274.

(f) 2 John.
Ch. Rep. 252.

(g) Vid. 1
Caines' Cas.
Err. 13.

Bleecker. It follows, then, that the power must have passed with it. The same reason exists as that for the forfeiture of a particular estate by alienation. The conveyance is a renunciation of the connection and dependence which existed between the mortgagor and mortgagee.(e) If Troup had no legal estate, he was no longer mortgagee. This was the only character in which he could sell. No one in nature of a trustee can sell to, and buy himself, except a mortgagee. This he has done, or attempted to do. Strip him of his character of mortgagee, and it is all we ask. Whether he retains the power or not, is immaterial. If his legal estate is gone, his character was that of a naked trustee, his power is uncoupled from his interest, he could not buy, and the sale to him upon the foreclosure was absolutely void. The authorities to this point are all collected by the late Chancellor, in *Davoue v. Fanning*.(f) Nor does it vary the case, that only a part of the land was conveyed. If the power was gone as to part, it was gone as to the whole. The nature and object of this power is well explained by the present respondent, Col. Troup, and his colleague, the late Judge Benson, who were counsel for the appellants, in *Bergen v. Bennet*.(g) Take the rights of the mortgagee as there defined. He sold, in this instance, for the whole mortgage money due. This was as it should be; but how is he to do this, unless he retains the whole power over the whole land? What part of the land is to be sold, and how is the money to be applied? What would have been the safety of the bidder, had strangers been permitted to purchase? The right was embarrassed and entangled by the previous transfer, and bids are discouraged and suppressed. Troup was, indeed, not in a capacity to make a sale. It was a nullity, and the deeds passed nothing, either to Haight or Troup, and we are left in *statu quo*.

It may be said that the power passed to the grantees. If this be admitted, the condition of the respondents is not bettered by the concession. Their power has not been exerted. They have taken no part in the sale, either directly or indirectly.

Independent of strict law, the power should be considered as gone in propriety and policy. Obstacles were thrown in the way of bidders, and there could not have been a fair sale. The purchasers were not safe. "A mortgagee is bound to pursue his power strictly; and although he may sell part of the land at one time, and part at another, yet he cannot clog and encumber the part that he sells, but must sell simply and unconditionally the whole interest as the same was conveyed by the mortgagor."^(h) The mortgagee should have kept the whole in the same situation as when the mortgage was first executed. Who would dare to purchase Troup's estate, broken and disfigured as it was? These important objections were but little noticed in the Court below, for what reason we know not; but we are persuaded that had the Chancellor pursued the subject with his usual diligence, he could not have arrived at the result expressed by the decree.

7. The sale was not in good faith. It was not for the purpose of raising the money due upon the mortgage, but to protect the subsequent purchasers. Take the case mentioned by Kent, J.⁽ⁱ⁾ of a devise of land to executors, to be sold for payment of debts. Suppose them to sell under a title entirely distinct from their power, would they be at liberty to sell again, merely in order to protect the title of the purchaser? and not with intent to pay the debts, as required by their authority? The two cases are analogous; and the distinction is fully supported by the statute^(j) giving the mortgagee a right to purchase, which declares that such purchase, shall not be defeated for that reason, "provided that it was, in every other respect regular, fair, and with good faith." Was this sale within that proviso? Was it for a purpose contemplated by the act? Was it "fair?" The interest of the mortgagee was to sell at as small a price as possible; whereas the power was conferred for the reason that the mortgagee is interested to bid up to the full amount of the mortgage. It is for this reason alone that his case is made an exception to that of ordinary trustees. It was said by the Chancellor, that we had not made the point relating to the fraud. We answer that this was not necessary. We

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^(h) 1 Caines
Cas. Err. 18,
per Kent, J.

⁽ⁱ⁾ 1 Caines
Cas. in Err
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^(j) 1 R. L.
375, s. 10.

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apply to redeem. We are answered by the sale. We reply that it is an insufficient bar, because unfair and in bad faith. It was not necessary for us to attack, by the bill, what we possibly never knew. We may meet it upon the general replication. The charge of unfairness is confirmed by the result. The bid was \$350 only. No laches—nothing short of a deed of confirmation could validate such a sale.

Again: the mortgage was extinguished by the sales. Troup should have given us credit for the sums which he had received of the purchasers. Yet he sells for the whole sum secured.

It was said by the Chancellor, that our ground of objection is too broad—that it goes to deny the right of foreclosure even in equity. True. In answer to a bill, we might have shown the departure of interest, and it would have been equally available both in equity and at law. The mortgagee could not have taken a decree of sale for the whole upon a true bill, even if it had been taken *pro confesso*; for you cannot take a decree differing from the statement in the bill. If there was a right of foreclosure in equity, it should have been pursued there; and should not weigh against our objection to the statute foreclosure, any more than if there had been no power of sale, or the mortgagor had been under 25 years of age. A Chancery foreclosure would have been much more advantageous to the mortgagor. It would have given him more time to answer and make his defence, and raise the money upon a decree against him. The precise land would have been sold which is properly the subject of the sale. The tenants would have been brought in, and there would have been a fair sale upon a safe title, at the full value. Here Troup still retains a very considerable balance on the bond, which he may enforce by an action.

It is settled, that if there be any unfair conduct in the mortgagee, the Court will open the foreclosure.^(k) This will be favored. Powell after stating a variety of cases, in which foreclosures have been opened, says,^(l) “Except in the instance already mentioned, I do not find that any rules have been, nor do I apprehend that any can be laid down by the Courts of Equity, as to the exercise of their jurisdic-

^(k) 2 Pow.
on Mort. 1066,
7, 8.
^(l) Id. 1079.

tion in opening foreclosures, either with respect to the time, which shall be considered as a bar, or to the particular circumstances which will entitle a suitor to this interposition of the Court; for cases of this sort embrace such a variety of considerations, and are frequently so complicated in their nature, that each depends, in a great degree, upon its own combined circumstances, and may be rather considered as an instance of the fact, that the Courts will interfere to open a foreclosure, than as a general rule as to the circumstances in which relief will be given." A foreclosure has been opened after 16 years, upon very slight circumstances of unfairness.^(m) The Chancellor would not have sanctioned this sale upon a bill of foreclosure, for the very reason that the purchaser would not have been secure, and because the mortgagor had been embarrassed, and his rights impaired by the sale.

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(m) Id. 1080,
and the cases
there cited.

WOODWORTH, J. How were the mortgagor's rights affected? He might have tendered the mortgage money to Col. Troup, notwithstanding the sales.

Bleecker. True. But he might also have refused to receive it, and put the mortgagor to his bill to redeem against this multitude of purchasers, or any greater number. The mortgagor ought not thus to be embarrassed and delayed in his remedy.

M. Van Buren, for the respondents. This suit is a serious attack on the interests of a great number of men, upon merely technical grounds. They have purchased in perfect good faith, and the claim of the appellants is not entitled to the favor of any Court, especially a Court of Equity. Before the possessors are disturbed, the legal right should be most clear against them. I did not suppose it in the wit of man, to cast a shade of doubt upon their title.

The appellants are first met by the statute foreclosure. This they assailed before the Chancellor, upon the ground that it wanted form and regularity. These being amply proved, and that the mortgage was for no more than the fair consideration money, they now attack us, first, because

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there was no authority in Faulkner to execute the power of sale. This authority was to receive a conveyance, and execute a bond and mortgage, pursuant to a previous, conditional, executory contract between Williamson & Wilson. There is no doubt that a good and sufficient mortgage was intended, and an express clause was inserted, sanctioning every act necessary to the complete security of the purchase money. Was the mortgage, accompanied with a power of sale, an excess of authority?

There is no doubt that a power must be construed according to the intent of the party, to be deduced from the subject matter, which was a mortgage. What did the parties mean when they used the term? As early as 1788, these powers of sale had multiplied to a great extent, and many titles depended upon sales made under them. An act⁽¹⁾ was accordingly passed in that year, giving effect to those sales, which has been in force ever since. The act had existed for 12 years, and the practice of inserting the power of sale in use for a much longer time, when this authority was given to Faulkner, who was to do the business with a land

1) Act of Feb. 26, 1788, c. 7. 2 Jones & Varick, 263. This section is as follows:

"And whereas many real estates are held under sales made by mortgagees, who were authorized by the mortgagor or mortgagors to make conveyance of the same in fee, for the payment of the debt or demand secured by such mortgage, and to return the surplus of the purchase money to the mortgagor or mortgagors; and as many inconveniences may arise, vexatious suits be promoted, and *bona fide* purchasers ruined, if such estates should be redeemable in equity; therefore, be it further enacted by the authority aforesaid, that no *good* and *bona fide* sale of messuages, lands, tenements, or hereditaments, made or to be made by mortgagees or others authorized thereunto, by special power for that purpose, in due form of law, from him or them, who had the equity of redemption, shall be defeated to the prejudice of the *bona fide* purchasers thereof, in favor, or for the advantage of any person or persons claiming a right of redemption in equity; provided always, that nothing in this act contained, shall be construed to prejudice any other mortgagee of the same messuages, lands, tenements, hereditaments, or any part thereof, whose title accrued prior to such *bona fide* sale, or any creditor to whom the mortgaged premises, or any part thereof, was before bound by any judgment at law or decree in equity."

office, whose uniform custom required the insertion; the office of the Pultney estate, established for the sale and settlement of a million of acres, which had been in operation for several years, and whose rules must, therefore, have been generally known. Acting in reference to all these considerations, is there room to doubt for a moment, that the usual mortgage was intended? Sugden says,⁽ⁿ⁾ that "in considering the extent of a power, the intention of the parties must be the guide. Thus, on the one hand, a power limited in terms, has, in favor of the intention, been deemed a general power, whilst, on the other hand, a general power in terms, has been cut down to a particular purpose." The words need not always be strictly pursued. "Under a power of appointment, the donee may either appoint absolutely, or may reserve a power of revocation, although not expressly authorized to do so by the deed creating the power."^(o) The liberality with which powers are construed, to further the intent of the parties, is fully illustrated by the cases cited and summarily stated by Sugden on Powers, 1 Am. from 4d Lond. ed. 438, 439, 445, 459, 461, 478. At page 526, 7, an instance is given of construing the words of a power by the custom of the country. The Court are also referred to the same book, 549, 554, 610, 626, 628, 630, 631, as containing cases in support of the principle, that a general power must be construed in reference to the law and custom, and that the best security authorized by law or custom, should have been given by Faulkner.

Again; he was to do "all things necessary and lawful to secure the consideration money." It was necessary to give the power of sale, and Williamson had a right to require it. This was according to the custom of the office.

But is Wilson to be tolerated in saying that the power of sale is void, after having, by his attorney, received a deed as a consideration for that very mortgage which contains the power, and now, in the same breath, claiming to enforce it? He was certainly bound to give back the deed, before he could be heard to object against this power. By receiving the deed, he ratifies the power. He claims under a transaction, which he wishes to be holden void, for his purpose, on one

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(n) Sugden
on Powers,
459, 1 Am
from 3d Lond
ed.

(o) id. 310,
311, 321, and
the authorities
there cited.

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(p) *Holbrook v. Finney*, 4 Mass. Rep. 596.
Stow v. Tift, 15 John. Rep. 463, and vid. 13 Mass. Rep. 55.

(q) *Adams* Rep. 75.

(r) 2 Sch. & Lef. 267. Ld. Redesdale, citing Ld. Roslyn, M. S.

(s) *Bac Ab. Leases*, &c. (B)

(t) *Whistler v. Webster*, 2 Vca. Jun. 367.

(u) 1 *Caines' Cas. Err.* 17, 18.

hand, and valid for the same purpose on the other. It is the common case, where a party shall be put to his election in a Court of Equity, to say whether he will give up his claim *in toto*, under the instrument, or suffer the whole to stand. Both the deed and mortgage are, for this purpose, to be considered as one entire instrument.(p) This point was decided expressly by the Supreme Court of New Hampshire, who held that an infant should not avoid his mortgage for nonage and yet hold the land.(q) "No person puts himself in a capacity to take under an instrument, without performing the conditions of the instrument; and they may be express or implied."(r) An infant must elect, on coming of age, whether he will continue to occupy under a lease. If he continue, he is liable for all the rent incurred during his minority.(s) This is the settled and familiar doctrine in relation to a claim under appointments by a will.(t) Yet Wilson holds the deed, and in the same breath claims to disaffirm the mortgage. The attempt is a violation of common justice and honesty. He should be driven to his election. The deed was delivered on the strength of the mortgage. If that fails, the deed should fail with it, and the original owner be remitted to his rights. Suppose a failure to pay the consideration money under the original contract, and yet a deed executed, it would be voidable as being without consideration, or founded on mistake.

Being then a valid power of sale, it is objected, that the foreclosure was not regular; but every objection is abandoned, except that which relates to the non-registry of the original power and the power of sale. It was not necessary that the former should be recorded. No statute or principle of policy requires it, as to the mortgagor. As to the latter, the recording was necessary only for the protection of the purchaser. Kent, J. says, in *Bergen v. Bennet*,(u) (and this Court concurred with him,) that "the only use in recording the power of sale, is for the benefit of the purchaser; and it does not lie with the mortgagor to object to the validity of the sale by reason of that omission. He can have no concern or interest to be affected whether it be recorded or not."

But it is said our authority to sell was gone by our deeds to different persons, conveying a part of the premises. This is founded on a misapprehension of the rule, that wherever a subsequent exercise of power by the donee will defeat his previous grant, there it shall be holden inoperative, or to have been taken away by the first act. Take the case of a tenant for life, under a marriage settlement, with power to revoke the estates created by the settlement, and limit them to other uses. The tenant for life departs with his estate, and afterwards attempts to revoke under his power. The effort is nugatory, because in effect it would operate to defeat his previous grant. But in this case, our acts of partial sale did not subvert the relation of mortgagor and mortgagee. It is well settled, that the mortgagee can do no act prejudicial to the mortgagor's right of redemption; and the moment we purchased as the agent of the Pultney estate, this enured to confirm the sales we had made. *Jackson v.*

Bull(v) was a case substantially analagous to the present, so far as the confirmation of a previous sale is in question.—^{(v) 1 John} *Can. 81.*

Then these conveyances, intermediate the mortgage and foreclosure, were inoperative against the mortgagor; but the foreclosure protects our grantees, and avoids any objection from all quarters. This is a satisfactory answer. It was upon this, among other grounds, that the power was held well executed by Ld. Mansfield, in *Ren v. Bulkeley.(w)*

That case was much like the present. The leasing power was coupled with a life estate, which was granted away to pay an annuity for the life of the tenant, reserving a surplus. He then goes on to execute his leasing power, which was objected to, on the ground that his power passed with the grant; but, per Lord Mansfield, "Certainly, where the whole life estate is conveyed away by the intention of the parties, the power must be at an end, and cannot be afterwards executed, to the prejudice of the grantee; but the conveyance here was only to let in a particular charge, subject to which the rents and profits still belonged to Ld. Onslow; and the lease could not prejudice the security, nor the remainder-man, for the best rent must be reserved. It would, therefore, be contrary to the intention of

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all the parties, to hold that the power was extinguished by the conveyance to Briscoe." Thus the destruction of these powers depends upon the justice of the object to be promoted. The principle is the safety of the grantee. Another principle (and which is deducible from the case last cited) is, that where the act set up as the ground of destruction, is done in good faith, to preserve the estate granted, a Court of Equity will not decree a destruction. Here was no prospect of a redemption. Many years had elapsed without an offer to redeem. The equity of redemption was treated as abandoned, and the exercise of the power was done in confirmation of the title of the grantees, and in the most perfect good faith. The principle of destruction is one of forfeiture for fraud and injustice. Ours is a fair and innocent exercise of the power.

This is not a case in which the sale of the estate destroys the power. Though in legal privity with the estate, it is not so appendant as to be destroyed. It is a power in gross.(x) The English cases do not exactly govern, because this power is not known there. Here are two distinct interests. The mortgagee is the owner, as against the mortgagor. He may bring ejectment, recover possession, or sue for the rents. So may his heir. Another interest is in the power of sale, as a security for the debt, which he may or may not exercise at his election. This is a personal chattel, which goes to the executor. To either right he may resort. They are distinct and separate, and the transfer of one does not affect the other. It does not follow, because they are in privity, that the power is appendant and destroyed by a transfer of the legal estate. If so, a mere entry would destroy it, which cannot, I think, be pretended. But, at any rate, no case has been or can be shown, in which the transfer of a portion of the estate only, destroys the power. The language of the books and the cases cited, is *totum statum suum*. All the cases are of total alienations. A forfeiture is insisted upon—a thing odious in the eye of a Court of Equity—and the appellants must bring themselves strictly within the rule under which they claim.

(x) vide Sug.
on Powers, 1
Am. from 3d
Lond. ed. 46.

If it is a destruction, *pro tanto*, the objection then could not upon any principle, reach beyond the parts conveyed. The most that could be claimed is, that it should transfer the power to our grantees. Every assignment of a mortgage would otherwise destroy the power. It was then a mixed interest, part in the Pultney estate and part in our grantees. Here has been a foreclosure. The mortgage was never technically assigned ; and the foreclosure was rightly in our name. But it is immaterial in whose name it was. The notice of sale was as effectual to apprise the mortgagor of the proceeding, as if it had been signed by all the grantees. It does not lie with the former to object. It is a right which, if it exists at all, is confined to the grantees, who do not object. Nor has any exception been taken to the proceedings, at any stage of the cause, on account of the non-joinder.

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It is said that the foreclosure was not with a view to collect the money. Is the objection on this ground serious ? Are all the purchases which have been made, to confirm titles, thus to be overturned ? A purchase may be made for any legal object.

R. Sedgwick, in reply. Some positions advanced on the other side, require, on the part of the appellants, a brief recurrence to first principles. Our ancestors have sought to strengthen, in every possible way, their right to the soil, and the rules relative to real property, growing out of this propensity, have descended upon us. A man has the fee : how is he to be divested of it ? Certainly in no other way than by a conveyance or adverse possession ; for, in this country there is no corruption of blood by attainder. The estate of a mortgagor is not an exception. How, then, is our land to be taken away ? It is said, on two grounds. 1. Abandonment. 2. A statutory foreclosure. If we sweep away these, there is an end of all declamation about the rights of these purchasers. Hard cases make most injurious precedents. The respondents, who purchased of the Pultney estate, acted with open eyes. Our title was upon record. If they chose to act upon fancy or idle humor, that

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Wilson had abandoned his title, are they, therefore, to be favored?

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WOODWORTH, J. I am sure the ground of abandonment cannot be seriously contended by the respondents.

Sedgwick. Perhaps not. But it has been sought to give it some importance, when taken in connection with the sales which it is said the foreclosure was designed to protect. Hence we thought it our duty to reply.

SUTHERLAND, J. I am convinced there is nothing in this ground of abandonment.

WOODWORTH, J. It appears to me the great question is, whether the equity of redemption has been regularly and legally foreclosed.

(y) 4 T. Rep.
753.

(z) 14 John.
443.

Sedgwick. In reference to the question of Haight's competency, I shall barely refer to two cases, to show that he was not acting professionally, within the rule relied on to exclude him. One is that of *Wilson v. Rastall*, (y) where Buller, J. says, "though it was said the defendant consulted him, (the attorney,) in his profession, as a confidential person, the meaning of that was, that as he was more conversant with business of this kind, than those who were not of his profession, the defendant consulted him but did not employ him as an attorney." *Jackson v. Dominick*, (z) shows that a statutory sale or foreclosure is not a judicial, or any thing of the nature of a judicial proceeding.

Faulkner had no authority to insert the power of sale, unless this was essential to the nature of a mortgage. It was clearly not so at common law, nor is it considered so by the statute. The late revisions do not contain the recital of the act giving effect to a sale under a power. This may, however be found in 2 Greenleaf's ed. of the laws, 101, s. vii. (a)

(a) It is there
as in Jones &
Varick, cited
ante, 216, (s).

This does not contemplate the power as a part of the mortgage. It may be separate. It is called there a "special power." As to the general clause in Faulkner's power,

here was one still more broad in *Nixon v. Hyserot*.(b) The attorney was authorized there "to execute, &c., such conveyances and assurances in the law, &c., as should or might be needful or necessary, according to the judgment of the said attorney," giving a broad latitude of discretion. Yet an attempt to bind the principal by covenant was holden void.

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(b) 5 John
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WOODWORTH, J. The covenant there created a liability beyond the ordinary effect of a conveyance.

Sedgwick. This power of sale is equivalent to an additional liability. When one buys land, he certainly means to get a title. If he gets none, the purchase money should be paid back. This case is much stronger than the one cited. A summary power of foreclosure is given. Faulkner might as well have inserted a covenant not to redeem at all. The custom of the Pultney land office is nothing. The law of the state is not to be manufactured there. Nor does the statute sanction such a power as seems to have been supposed by the Chancellor. It merely regulates, and declares the effect of a sale under it, when the party thinks proper to give it. I will only say, as to the cases cited by the Chancellor to this point, that the acts performed were within the terms of the power, and his reasoning is precisely the contrary of what it should be from his premises. The case cited by him from 6 Vesey,(c) gives the true result of the cases, which go upon the maxim, *omne majus in se continet minus*. A power to convey a fee gives power to convey a less estate. The Chancellor supposes that, because there is nothing in Faulkner's authority expressly excluding the power of sale, it is therefore included: The reverse is correct. The authorities(d) all show the rule, that a special authority should be construed strictly, to be one of the greatest rigor. In *Doe v. Peach*, the appointment was required to be signed and sealed, &c., and because the signing was omitted, it was holden void. The attorney cannot transgress his power one hair's breadth, and will not be allowed to do so even by a Court of Equity. The case cited(e) of a power construed by custom, was where the words received their meaning

(c) Ante, 201
(d) Co. Litt.
113 a. *Fenn
v. Harrison*, 3
T. R. 757.
Gibson v. Colt,
7 John. 390.
*Hawkins et al.
v. Kemp*, 3
East, 410.
*Wright v.
Wakeford*, 4
Taunt. 213.
Doe v. Peach,
2 M. & S. 576

(e) From
Sugden on
Powers, 1 Am.
from 3d Lond.
ed 526, 7.

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from this source ; as "clear yearly value," did in that case ; not as here, where the terms are known and defined by the common law.

The execution of a power may be good in part and void in part. "Where there is a complete execution and something *ex abundanti* added, which is improper, there the execution shall be good, and only the excess void."(*f*)

(*f*) Id. 549.

The acknowledgment of the power of sale in Pennsylvania was void.(*g*) This is not denied, but the authority of *Bergen v. Bennet*,(*h*) is relied upon, where Kent J. thought no record necessary as to the mortgagor. This was not the question in that case : It was, whether the place of recording was proper, and held that it was. All that Kent, J. says as to the necessity of recording the power at all, was, therefore, *obiter*. The party purchases at his peril, and must look to the regularity of the proceedings.(*i*)

(*g*) *Jackson*
v. *Wickoff*, 1
John. Rep.
498.

(*h*) 1 *Caines'*
Cas. in Err.
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(*i*) *Jackson*
v. *Clark*, 7
John. 217

The power was gone by the conveyances from Troup to the other respondents.

[WOODWORTH, J. Do you mean that the power itself was gone, so that no sale could be made under it by any one.]

Sedgwick. This is what we contend.

[WOODWORTH, J. What sort of estate passed by the conveyances from Troup ?]

Sedgwick. That I am going to consider. It is said, that this is a power in gross. It is not very material, whether it be so or not. It is enough that it is a power coupled with an interest, and done relating to the land within the note 298 to Co. Litt. 342 b. If the *donee* convey *totum statum suum*, as he has done in this case, the power is gone ; and Troup had no power to sell a second time. In *Ren v. Bulkeley*,(*j*) cited against us, Lord Mansfield says, "It is contended that, by granting away his life estate, he extinguished the power. Certainly where the whole life estate is conveyed away by the intention of the parties, the power must be at an end ; and cannot be afterwards exercised to the prejudice of the grantee." Grant me that Troup could not sell as against the grantees, and it overturns the whole doctrine of the oth-

(*j*) Dougl.
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er side. I care not whether he conveyed or reserved the debt. The grantees would hold the legal estate in trust, for the one beneficially interested. Troup could not sell as against the grantees: could he then sell for them, and with the view to protect their title?

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[WOODWORTH, J. Might they not have joined him in the sale?]

Sedgwick. It is enough that they have not done so. Granting that they might have joined in a sale for their benefit and that if he sold at all, it must have been for their benefit, they have never authorized him to do this. They entered, relying upon the good faith and resources of the Pultney estate.

But suppose the grantees had given authority: what kind of sale is to divest our estate? The statute contemplates a fair sale on six month's notice, (k) at which all the world may bid. What kind of sale is that at which the mortgagee, or these individuals alone, are to bid for the private purposes of the latter? They never would authorize him to sell their rights to a stranger. The authority must have been for their benefit, not to sanction a sale in fair market. This is said to be for a very equitable purpose; and it is conceded that, in ordinary cases, one cannot sell after he has departed with his power, but an exception is alleged in favor of a sale to protect grantees. Are there no other rights in this case? Has the mortgagor none? May he not contend for a strict statute sale?

(k) 1 K. &
R. 482, a. 6.

[SUTHERLAND, J. The proceeding to foreclose, by a general advertisement, conceded that the previous conveyances were nothing. The argument for the respondent concedes the same, and that the bidding was open to all the world.]

Sedgwick. We do not join in that concession. If the sale may be made in protection of the grantees, it is stepping beyond the statute. Troup having extinguished the power to sell in payment of the debt, he can no longer execute the statute.

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[WOODWORTH, J. Were not the purchasers from Troup assignees of the mortgage *pro tanto* ?]

Sedgwick. If so, they are assignees still ; for they have never joined in the foreclosure. They are strangers to the proceeding. But if they had joined, it should have been in a general sale, for the purpose of discharging the mortgage ; not merely to benefit themselves.

[SUTHERLAND, J. What right have you to ask for whose benefit the sale was made ? You had a right to redeem before the sale. The biddings were open upon a general advertisement. If the conveyances by Troup operated as a technical extinguishment, that is one thing ; but if otherwise, I do not see the force of the inquiry, for whose benefit the sale may have been made, or to whose use it may enure ?]

Sedgwick. If the sale was not with intent to pay the bond, it was fraudulent and void. The statute contemplates a sale for no other purpose. The covenant is to pay the money, or that the mortgagee may sell according to law, rendering an account of the overplus moneys. The whole covenant and power is violated, if the sale be for any other purpose.

Again : Under a purpose of this kind, clogged and embarrassed as the right was by the previous partial transfers, there was no fair chance. The trust was to sell, giving every fair opportunity to purchasers, in order that the estate might fetch its full value.^(l) Every thing calculated to prevent competition renders the sale void.^(m) Suppose Troup had published his purpose in the advertisement. This question brings it to the test. Appearances and formality are vain, unless the purchase be *bona fide*.⁽ⁿ⁾

It is said that the objection grounded on the destruction of the power can, at most, reach only a part of the premises, because it cannot be affirmed of Troup, that he has sold *totum statum s. rem*. But this phrase, as used in the cases, applies to the interest, not the land. The *whole* of his estate is, in this case, gone in *part* of the land.

^(l) *Denning v. Smith*, 3 John. Ch. Rep. 344.

^(m) *Jackson v. Crafts*, 18 John. 110.

⁽ⁿ⁾ 14 John. 143.

WOODWORTH, J. The appellants filed their bill in the Court of Chancery, to redeem certain lands which William Wilson, by his attorney, Daniel Faulkner, mortgaged to Charles Williamson, on the 21st October, 1796. Several questions are raised as to the right to redeem. It is insisted by the respondents, that there was an abandonment by Wilson. In looking into the case I have not discovered any facts that warrant this conclusion. Dugald Cameron testifies, that the lands having been abandoned, Williamson took possession in 1800, treated the property as his own, caused a re-survey to be made, and sold parts to various persons. Wilson informed him he was very much embarrassed in his circumstances. It was the understanding at the land offices, that the mortgage was not to be collected, but the estate was to take back the land—that it had been so considered after Troup, succeeded to the agency. This proof is altogether equivocal and unsatisfactory. The subsequent transactions clearly evince, that Wilson did not consider his right abandoned, nor did the respondents deem it safe to rest on that ground. The letter of James Reese, dated August 10th, 1802, called on Wilson to make payment of the land; or that decisive measures would be taken. The respondent, Troup admits, that in 1807 he applied to him for a release of the equity of redemption, which he declined unless he received compensation. In 1812, a tender of the money due was made and refused. I lay no stress on the circumstance that the original deed was found in the office of the respondents. I presume it had lain there from the time it was executed. There is no proof that it was ever actually received by Wilson. It is not necessary to dwell on this part of the case. There is no foundation for insisting on the extinguishment of the right to redeem.

It is contended by the appellants, that Faulkner, who executed the mortgage, as Wilson's attorney, had no authority to insert a power of sale. The power was general, to seal, deliver and acknowledge a mortgage to Williamson, thereby ratifying all that his attorney should lawfully do in the premises. Wilson resided in the state of Pennsylvania, and probably may not have been acquainted with the sta-

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Abandonment
not made out.

Whether
Faulkner had
authority to
execute pow-
er

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Power to execute mortgage will not authorize execution of instrument of different effect.

Clause of sale.

Intent derivable from circumstances.

In construction of contracts, situation of parties and subject matter to be considered.

tute remedy to foreclosure. He undoubtedly has a right to insist that the term "mortgage," which is of known and definite signification in the law, cannot be satisfied by substituting another instrument, differing in its legal effect and operation. Had this been done, the case would have fallen within the principles laid down by the appellant's counsel, and supported by authority, that where an attorney is authorized to sell and execute conveyances, he has no power to insert a covenant of seisin, the power to sell not giving a power to warrant the title of the thing sold. (5 John. 58. 7 John. 390. Com. Dig. Attor. C. 11.) It does not appear to me that there has been any departure from the power. The insertion of the clause to sell, does not confer on the mortgagee a greater security than was intended. It applies solely to the remedy. It does not impair any right of the mortgagor.

It will be remembered, that by the covenant of Williamson, in 1795, *a good and sufficient bond and mortgage* were to be given on receiving a conveyance. Cameron says, that two land offices were established: one at Bath—another at Geneva: That the existence of the offices was well known in Pennsylvania, from whence the first settlers came: That it was the invariable practice to take mortgages with the clause authorizing a sale pursuant to the statute. When Williamson speaks of a mortgage, it must be intended he meant a mortgage in the form used at his offices. This cannot be doubted.

Faulkner must have understood the contract, as requiring a mortgage in the usual form. It would be a violation of the presumed intent of the parties, to construe it otherwise. When Wilson executed the power to Faulkner, the year after, to carry this covenant into effect, what was intended? A security corresponding with the forms then used and approved. Williamson, under the covenant, had a right to say, the mortgage shall contain this clause. Such was the understanding between him, Faulkner, Hall and Freeland.

It is well settled, that in the construction of all contracts, the situation of the parties, and the subject matter of their transactions may be taken into consideration, in determining the meaning of any particular sentence or provision. Extrane-

ons evidence is admissible, so far as to ascertain the circumstances under which the writing was made, and the subject matter to be regulated by it. *Sumner v. Williams*, 8 Mass. 214. *Fowle v. Bigelow*, 10 Mass. 384. *Whallon v Kaufman*, 19 John. 104.) Apply these principles to the case before us, and it cannot be well questioned that a mortgage, with a clause authorizing a sale under the statute, was no more than a fair compliance with the covenant. If this be correct, I think it follows that Wilson, afterwards acquiring an interest in the contract, and coming forward to fulfil it, cannot vary the terms. He could not require a deed, unless the mortgage offered satisfied the intent of the original contracting parties. When he uses the same terms as in the previous covenant, they must be understood in the same manner.

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This rule applied.

It is further objected, that the power of attorney was not legally recorded, before the conveyance for the sale was executed. The power was first proved before Waterhouse, a Master in Chancery, in 1809. He was employed to go to Pennsylvania to take the acknowledgment. This is, I think, *prima facie*, evidence that it was taken without this state. But it was afterwards proved and recorded, in 1812, subsequent to the deed of conveyance given on the sale, and the question is, whether it lies with the mortgagor to raise the objection. The *sale* is not affected, although the power has not been recorded. This provision is manifestly for the protection of the purchaser. It must be indifferent to the mortgagor. He has no interest to be affected by it, and cannot object. In the case of *Bergen and others v. Bennet*, (1 Caines' Cas. in Err. 17,) Kent, Justice, in delivering the opinion of the Court, says, "the omission to record the power will not affect the sale—that it does not lie with the mortgagor to object to the validity of the sale, by reason of that omission." This, however, was not the point then before the Court. The question was, in that case, whether recording the power in the book of mortgages, would satisfy the words of the act, which requires it to be recorded as deeds and conveyances usually are. Although the authority cited may be regarded as an *obiter dictum*, I am inclined to think it a correct exposition of the statute.

Whether power properly recorded.

Sale good the power not recorded.

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Whether
mortgagee,
having con-
veyed part,
can foreclose.
Objection.

Whether
Troup could
foreclose in his
name only.

Statute fore-
closure equi-
valent to one
in equity.

All parties
interested,
should unite.

Mortgagee
conveys;
grantee is not
assignee; and
need not be
party.

Mortgagee
purchases up-
on foreclosure,
his grantee
protected by
estoppel.

Mortgagor
deemed seised.

The next objection against the validity of sale is, that the mortgagee having conveyed parts of the mortgaged premises in fee simple with warranty, cannot proceed to sell under the power. If I rightly understand the force of this objection, it is, that the mortgagee, having released and conveyed a part of the land, cannot solely, without noticing the rights of the persons to whom he has conveyed a part, foreclose the mortgage. To say that a mortgage could not be foreclosed, by making all parties in interest parties to the foreclosure, would be a proposition altogether untenable. I will therefore inquire whether it was not competent for Troup, as administrator, in his own name solely, to advertise and sell. The power authorizes the mortgagee, his heirs, executors, administrators and assignees, to sell the premises at public auction. A statute foreclosure is equivalent to a foreclosure and sale under a decree of a Court of Equity, and cannot be defeated to the prejudice of a *bona fide* purchaser, in favor of a person claiming redemption in equity. (10 John. 185, *Jackson v. Henry*.) It is undoubtedly necessary that all parties in interest unite. (1 Brown's Ch. 368. 2 Pow. on Mort. 285.) But it is an interest in the mortgage that is intended. If the mortgagee, under a mistaken notion, that he is absolute owner, grants and conveys the lands mortgaged, in fee with warranty, the purchaser does not come in as assignee of the mortgage; his purchase has no reference to it, and consequently he is not entitled to be made a party in a bill to foreclose. His title is taken subject to the mortgage, and liable to be defeated, if the premises are redeemed. If the mortgagee is the purchaser at the sale, then his previous grantee would be protected on the ground of estoppel, as the mortgagee could not claim in opposition to his deed. (12 John. 201. 13 John. 316. 14 John. 193. 1 John. Cas. 81.) In point of fact it never was intended that the grantees of Troup should take as assignees. The mortgage was entirely out of the question, in the view of the parties. The mortgagor, notwithstanding the mortgage, is deemed seised, and is the legal owner of the land, as to all persons except the mortga-

gee, and his representatives. (*Hitchcock v. Harrington*, 6 John. 290.)

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In *Runyan v. Mersereau*, (11 John. 534,) it was held, that at law and in equity, a mortgage is a mere security for money. The mortgagee has but a chattel interest, which will pass by delivery without writing. In *Jackson v. Curtis*, (19 John. 325,) it was held, that the mortgage is a mere incident to the bond, as personal security for the debt, and that an assignment of the interest of the mortgagee in the land, without an assignment of the debt, is considered in law as a nullity. This case fully proves, that conveying parts of the mortgaged premises can have no effect upon the mortgage, because had it been an assignment in form, nothing would pass; for the debt due on the bond, to which the mortgage is incident, was left untouched.

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Mortgage a
mere securi-
ty;

A chattel
interest, and
will pass by
delivery.

Is incident
to bond.

Assignment
of interest in
land without
debt, a nullity.

From this examination, I am satisfied it is not competent for the appellants to object, that a part of the land had been conveyed previous to the sale. If the grantees from Troup had acquired an interest in the mortgage, then, indeed, I apprehend the objection would have been well taken. It then would appear, that all the persons interested in the mortgage, had not joined in the notice of sale. The act contemplates, that the notice be given and the sale made by the mortgagee or others thereunto authorized. If the mortgagee has assigned all his interest, notice must be given by the assignee. If a part of the bond and mortgage is assigned, the mortgagee and such assignees are the proper parties. I think it follows, that if a mortgagee, solely, undertakes to give notice and sell, when other persons are interested as assignees, the regularity of such proceedings cannot be supported. The objection here falls to the ground; for Troup, as administrator, was exclusively the representative of the mortgagees, who alone held the interest in the security. I concur in the opinion of the Chancellor in saying, that the sales by the mortgagee could not, upon any reasonable principle, deprive him of the right of foreclosing the mortgage, nor could they prejudice the right of the mortgagor to redeem. They created, of themselves, no obstacle to the right of redemption. If the

All persons
interested in
mortgage
should join in
notice of sale.

Assignee of
whole interest
should give
notice.

Assignee of
part should
join mortga-
gee.

Partial sale
cannot preja-
dice right of
mortgagor.

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mortgagor was entitled to redeem, he could recover the possession, as against those purchasers, equally as well as he could recover it against the mortgagee himself.

In the view I have taken, it becomes unnecessary to discuss the question, whether the disclosure by Haight ought to be considered confidential as between attorney and client.

Decree should
be affirmed

My opinion is, that the decree of the Chancellor be affirmed.

The question.

SUTHERLAND, J. The question presented by this case is, whether the equity of redemption of the mortgagor has been legally foreclosed. It is contended, on the part of the appellants, that the foreclosure is illegal, on the following grounds:

1. That Faulkner, who executed the mortgage as Wilson's attorney, had no authority to insert a power of sale under the statute.

2. That Faulkner's power of attorney was not legally recorded before the sale under the mortgage.

3. That the mortgagee, or his assignees, having sold and conveyed parts of the mortgaged premises, in fee simple with warranty, before the foreclosure, could not subsequently foreclose and sell under the power.

4. That the sale was not made for the purpose of collecting the money due on the bond, and was, therefore, void; and that the purchase was made by Troup as trustee, and not mortgagee. I shall very briefly consider each of these objections in its order.

Whether
power to
Faulkner, au-
thorized him
to give a mort-
gage with a
power of sale,
and summary
foreclosure.

1. The power of attorney from Wilson to Faulkner, empowered him to receive a deed from Williamson, for the land purchased, and to sign, seal, deliver and acknowledge *to the said Williamson, a mortgage or mortgages of said land, together with a bond or bonds, for the consideration money, and to do and perform all things necessary and lawful to the obtaining a title to the said land, and securing the consideration money therefor, to the said Williamson.*

Mortgage
good without
power of sale.

That a mortgage may be made, without containing a power to the mortgagee to sell in default of payment, there is

no doubt. Such power is not usually contained in English mortgages ; and they have no statutory provision regulating sales in pursuance of them.^(o) If, then, it be a just rule of construction, as applicable to powers of attorney, that no authority is to be deemed to pass by them, but such as the terms used necessarily import, in their most restricted legal sense, it would, perhaps, follow, that an authority to mortgage would not authorize the sanction of a power to sell.

But I apprehend such is not the rule of construction by which powers are tested. Sugden on Powers, 459, lays down the rule thus : "In considering the extent of a power, the intention of the parties must be the guide. Thus, on the one hand, a power limited in terms, has, in favor of the intention, been deemed a general power, whilst on the other hand, a general power, in terms, has been cut down to a particular purpose." And this position is fully supported by the authorities.

Thus, in *Hinchinbroke v. Seymour*, (1 Br. Ch. C. 395,) there was a power in a settlement to raise a portion for a younger child, *at such time as the father should direct*. He directed it to be raised when she was 14 years of age ; and she dying, he files the bill for it as her administrator. The Lord Chancellor says, "the meaning of a charge for children is, that it shall take place when it shall be wanted. It is contrary to the nature of such a charge, to have it raised before that time ; and although the power is, in this case, to raise it when the parent shall think proper, yet that is only to enable him to raise it in his own life, if it should be necessary. It would have been very proper so to do, upon the daughter's marriage, or for several other purposes ; but this is against the nature of the power." In *Tankerville v. Coke*, (Mose. 146,) it was held that a power should be so construed as to effectuate the intention of the parties. There an act had been done which the terms of the power authorized ; but which was evidently against the intention of the donor. In *Morris v. Preston*, (7 Ves. Jun. 547,) a provision, in case of the death of a trustee, for the substitution of another, and a conveyance by the survivor, so that he

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(o) Pow. on
Mort. 13, 14
Croft v. Powell et al., Com.
Rep. 603. 10
John. 196, per
Kent, Ch. J.

Rules of
construction
as to powers in
general.

Cases.

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and the new trustee should be jointly interested in the trust, was, by the concession of counsel, admitted to be satisfied by the *substitution of two trustees*, after the death of both the former, against the express terms of the power; because it was the evident intention of the power, that new trustees should be appointed, whenever circumstances might require it. In *Ren v. Bulkeley*, (Doug. 292,) Ld. Mansfield says, "the creation, execution and destruction of powers depend on the substantial intention and purpose of the parties." *Bristow v. Warde*, (2 Ves. Jun. 336,) *Talbot v. Tipper*, (Skin. 427,) *Mildmay's case*, (1 Co. 175, a.) *Liefe v. Salt- ingstone*, (1 Mod. 189,) 1 Freem. 149, 163, 176, S. C. all establish the same doctrine. It is also illustrated and confirmed by the case cited by the Chancellor of *Roberts v. Dixall*, (2 Eq. Cas. Ab. 668,) and *Long v. Long*, (5 Ves. 445,) which, as he has well observed, "show the liberal construction given to powers in equity, in furtherance of the end for which they were created."

The intent,
not merely the
letter, is to be
regarded.

In construing a power of attorney, therefore, in order to ascertain whether it has been well executed, the letter of the instrument is not to be exclusively regarded; but the important inquiry is, have the intentions of the parties been carried into effect.

Now I cannot entertain a doubt from the circumstances of this case, that Wilson used the term "mortgage," in the power of attorney, in its popular and customary sense in this country; that is, as descriptive of an instrument containing not only a conditional conveyance of the land but also a power to sell in default of payment. There is nothing on the face of the instrument, evincing a contrary intention. There is no peculiar caution manifested on the part of Wilson, in the delegation of power to his attorney, from which it can be inferred that he intended the terms employed by him should receive the most rigid construction of which they were susceptible. On the contrary, the language used is general and comprehensive. He empowers him to give *one or more mortgages*, to do all things necessary and lawful to obtain a title to the land, and to secure the consideration money to Williamson.

Faulkner and his associates, who originally contracted for this land with Williamson, must be supposed to have known and understood that the securities always required by the Pultney estate were mortgages containing powers to sell, and that the mortgage, which they were bound to give, was of that description. The contract was made in this state, and to be executed here where hardly any other kind of mortgage was in use. Wilson was the assignee of one of those associates, entitled to all his rights, and subject to all his responsibilities under the contract with Williamson. If, then, the original associates were bound to give a mortgage containing a power of sale, which I apprehend cannot be questioned, Wilson, as the assignee of one of them, could not have compelled Williamson to give him a deed, without tendering such a mortgage. If not, then the authority to insert such a power in the mortgage was given to the attorney by the general terms, conferring upon him "*power and authority to do and perform all things necessary and lawful to obtain a deed.*" Without such a clause in the mortgage, no deed would have been given. It was, then, necessary to insert it.

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I am, therefore, of opinion, upon the first point, that the attorney, Faulkner, had authority to insert in the mortgage a power of sale under the statute, and that the foreclosure is not to be impeached on that ground.

Faulkner had
authority to
insert power
of sale.

2. I know of no necessity for recording the power of attorney at all, unless it be true, as a general proposition, that whenever the law requires an instrument to be registered or recorded, if that instrument is executed by attorney, the power of attorney must be recorded also, which was not contended for upon the argument, and I apprehend cannot be maintained.

Not necessary
to record pow-
er of attorney.

The power to the mortgagee to sell, contained in the mortgage, must be recorded, before the deed to the purchaser under the power be executed: but that is for the benefit of the purchaser only, to perpetuate the evidence of the authority by which the sale was made; and the mortgagor can not impeach the sale, if the power is not recorded. (1 Caines' Cas. in Err. 17, per Kent, J.)

Mortgagor
cannot object
that power of
sale is not re-
corded.

Admitting, therefore, that there was the same necessity

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So of the pow-
er from Wil-
son.

Whether, if
a mortgagee
conveys part
of the mort-
gaged premi-
ses, it di-
vests him of a
power to fore-
close for the
whole.

Nature of
power of sale.
It is coupled
with interest;
Appendant;
Not in gross.
Distinction.

Conveyance of
whole would
pass, not ex-
tinguish pow-
er.

by law for recording the power of attorney to Faulkner, that there was for recording this power to sell, the mortgagor could not avail himself of the omission to record it. The execution of the power of attorney is admitted by the appellants, and the objection is not to the proof of the execution.

The sale, therefore, is not to be impeached on this ground.

But,

3. It is contended that by the sales of portions of the mortgaged premises by Troup, before the foreclosure, the power to sell contained in the mortgage, was either extinguished, or passed to his grantees; that the sale, therefore, under the mortgage, was without authority.

The power of the mortgagee to sell the mortgaged premises, is undoubtedly a power coupled with an interest, (*Bergen v. Bennett*, 1 Caines' Cas. in Err. 15, per Kent, J.) and it may perhaps be conceded, that it is a power *appendant* or *annexed* to the estate, and not a *power in gross*. These powers are thus distinguished by Hargrave and Butler, in their notes to Coke upon Littleton, (note 298 to Co. Litt. 342 b.) The former, that is a power *appendant*, "is where a person has an estate in the land, and the estate to be created by the power, is to (or may) take effect in possession, during the continuance of the estate to which the power is annexed, as a power to tenant for life in possession, to make leases. A power in gross is, where the person to whom it is given has an estate in the land, but the estate to be created under or by virtue of the power, is not to take effect till after the determination of the estate to which it relates."

Now, the power of the mortgagee to sell, is a power to create or acquire to himself the equitable estate in the land, during the continuance of the legal estate conveyed to him by the mortgage. It seems, then, more properly to fall within the description of powers annexed to the estate, than any other, and the question is, as to the effect of a conveyance of a part of the estate to which the power is annexed, (before the power is executed,) upon the power itself.

A conveyance by the mortgagee of his whole estate, would undoubtedly pass, and not extinguish the power. This is the common case of an assignment. The assignee takes not

only the legal estate, but all the remedies or powers attached to it. But the conveyance of a portion of the estate, will not, in law, carry with it a corresponding portion of the power, because this is in its nature indivisible. It can operate but once, and then is exhausted.

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The effect then of a conveyance of a part of the mortgaged premises by the mortgagee, I apprehend to be this: It produces a suspension of the exercise of the power as to the part conveyed, in hostility to the rights of the grantee; that is, the grantee shall not defeat his own grant. But the operation of a suspension of the power, whether it applies to the whole or a portion of the estate, is merely to postpone the vesting of the estate, or interest created by, or acquired under the power, in *possession*. It does not suspend or affect the right to execute the power, and perfect the title to the estate. But the *possession* of the estate, the right to which has been acquired by the execution of the power, shall be suspended or kept from the donee of this power, so far as his previous acts render it just and equitable that it should.

Grant of part suspends exercise of power upon this portion, in hostility to the right conveyed.

Effect of suspension.

This principle is clearly recognized by Sugden in his *Treatise on Powers*, 52, and supported by several cases, (*Snape v. Turton*, Cro. Car. 472. *Goodright v. Cator*, Doug. 447.)

The principle is familiarly this: A mortgagee in possession leases a portion of the mortgaged premises for a year. At the end of six months, he sells the whole of the premises under his power, and becomes himself the purchaser. The power is well executed, and vests the equity of redemption in the whole of the premises in the mortgagee, subject, however, to all the rights of his lessee. So far as the *possession* of the estate, or interest acquired under the power, is inconsistent with his lease, it shall be suspended, but shall take effect as to the residue.

Illustration.

The sale by Col. Troup, therefore, of portions of the mortgaged premises, neither extinguished nor suspended his right to foreclose the equity of redemption. Having become the purchaser under the power, his possession shall be suspended so far as it is inconsistent with his previous grant;

Troup's right to foreclose not extinguished by partial sale.

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Purchase en-
ured to bene-
fit of grantees.

Partial sales
did not effect
right of mort-
gagor.

Foreclosure
valid.

Mortgagee
may purchase
under power,
though he has
conveyed a
part.

His grantees
are assignees
pro tanto.
Trustee may
purchase for
benefit of his
cestuy que
trust. No one
but him can
question pur-
chase.

and his grant having been in fee, he can never claim any thing under the power in relation to the lands granted.

His purchase, therefore, shall enure to the benefit of his grantees—"For, if a man sell land which is not his, and afterwards purchase it, he shall be bound by his deed, and not be permitted to aver he had nothing." (Per Kent, J. in *Jackson v. Bull*, 1 John. Cas. 90. *Iseham v. Morrice*, Cro. Car. 110. *Ren v. Bulkeley*, Doug. 291.)

The sales by the mortgagee, did not in the least affect the rights of the mortgagor. The mortgage was, at that time, valid and subsisting; the sales were subject to it, and the mortgagor, upon redeeming, could have turned the purchasers out of possession, as well as the mortgagee himself.

I am, therefore, of opinion on this point also, that the foreclosure is not to be impeached.

Nor is there any force in the objection, that the Pultney estate had no right to purchase at the mortgage sale, after having sold portions of the mortgaged premises. That they still continued to be mortgagees, necessarily results from what has already been said; but whether they were so or not, is perfectly immaterial. The 10th section of the act concerning mortgages (1 R. L. 375) provides, "that no title to mortgaged premises, derived from any sale made in virtue of a special power, shall be questioned, impeached or defeated, either at law or in equity, by reason that the mortgaged premises were purchased *in by the mortgagee, or his or her assignee* (or assignees) *or for his, her or their benefit or account*." I have already shown that the purchase by Col. Troup, enured to the benefit of the grantees of the mortgage, so far as it was hostile to those grants. So far as they had any interest in the mortgaged premises, they may be considered as assignees of the mortgagee, and the purchase by him *was for their benefit and account*; and admitting he was trustee for them, a trustee has undoubtedly a right to purchase, (not for his own benefit,) *but as the agent and for the benefit of the cestuy que trust*. No one but the *cestuy que trust* has a right to call in question, or set aside a purchase made by the trustee, (*Davoue v. Fanning*, 2 John. Ch. Rep. 252.) The mortgagor cannot say that the mortgagee was

trustee for him, with respect to the surplus which might be produced by the sale, and that he, therefore, is one of the *cestuy que trusts*, and has a right to question the purchase by the trustee. He purchased, either as mortgagee or for the benefit and account of the assignees of the mortgage, or in neither of those characters. If in either of them, the statute authorizes the purchase. If in neither, then he was not trustee, and had the same right to purchase as any other individual.

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But the truth is, Troup was mortgagee, and the proceedings were properly conducted in his name, and could have been in the name of no other person. The mortgage never was assigned. If it had been, it might have been necessary for the assignees to have united in the proceeding under the statute. Though if this should be omitted, it might well be questioned, whether the mortgagor could be received to object. The power (in default of paying the money) authorizes the mortgagee, or his assignees, to sell or convey the premises : and it would seem in point of form, to be well executed by the mortgagee, whether he retained the interest of the mortgage or not. The right of the mortgagor could, in no manner, be varied or affected by it. The proceeding under the statute is not a suit to which a defence can be made. However, it is unnecessary to express any opinion upon this point, because there never was an assignment of the mortgage ; and admitting that the assignee of a mortgage ought to be a party to the foreclosure, it can hardly be contended, that any person who may have an equitable interest under the mortgagee, must be made a party.

Whether proceedings to foreclose under statute should be in name of mortgagee or his assignees, &c.

Semb. a statute foreclosure by the mortgagee, even after he had assigned, would be well in point of form.

I am of opinion, therefore, that the sale of the mortgaged premises is not to be impeached on any of the grounds taken by the appellant's counsel, and that the equity of redemption has been legally foreclosed.

Foreclosure not impeached on any ground.

The conclusion to which I have come upon this view of the case, renders it unnecessary for me to consider the question of abandonment.

Abandonment.

Upon the question of fraud, I shall content myself with saying, that the case affords no color for the imputation.

No ground to allege fraud.

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Col. Troup, when he entered upon the agency of the Pultney estate in 1801, received the quiet and peaceable possession of the lands in question, together with the other lands belonging to the estate. No act of ownership had ever been exercised over it by the mortgagor. It had been treated and considered by Williamson, who preceded Col. Troup in the agency, and who made the sale to Wilson, as unincumbered land, and portions of it had been sold by him. Nothing had been paid by Wilson upon the mortgage, nor any effort made to redeem. The deed from Williamson to Wilson was found upon the files of the agency. These circumstances certainly justified the belief which existed in the office, that the purchase had been abandoned by Wilson; and Col. Troup, acting under that impression, sold and conveyed, in fee, portions of the mortgaged premises, as he asserts, and as the facts clearly show, *in the purest good faith*. Deeming it, however, prudent to have his title made technically correct, he applied to Wilson in 1807, for a release of his equity of redemption, which was refused, unless Col. Troup would make him some compensation for it, which he declined doing. This application of Col. Troup was not succeeded by any offer on the part of Wilson to redeem; nor did he ever offer to redeem before the foreclosure. A flourishing village has grown up on that portion of the premises, which has been sold by Col. Troup. I have not been able to find, in these circumstances, any thing to impeach the fairness of the respondent's conduct, or to entitle the appellants to the peculiar favor of a Court of Equity.

Decree should
be affirmed.

I am accordingly of opinion, that the decree of his Honor, the Chancellor, should be affirmed.

Whether
Faulkner was
authorized to
execute pow-
er of sale.

SAVAGE, Ch. J. (After stating the facts.) The question first in order is, whether Faulkner was authorized to execute the mortgage? If not, there is an end of the controversy.

By the power of attorney, he was expressly "to sign, seal, deliver and acknowledge a mortgage, &c., to the amount of the consideration money remaining due." Now, the consideration money remaining due, was the whole sum

for which the lands were sold, \$1 50 per acre, and the value of the mills. It is not denied that the mortgage is for the true sum; but it is contended, that the power to sell constitutes no part of the mortgage, and is, therefore, not within the terms of the power given to Faulkner. Although the instrument without the power of sale would still be a mortgage, yet the fair and common acceptation of the term *mortgage*, undoubtedly is, the instrument as usually drawn, and in common use as a mortgage, where the power of Faulkner was to be executed. The invariable practice of the Pultney land office, and of the whole community, at least in the state of New York, was to incorporate the power to sell. Our statutes supposed such a power, and W. Wilson must have intended to give a mortgage in the usual form, and granting the usual remedies. Hence the power of attorney adds these words: 'to do and perform all things necessary and lawful to obtaining to me and for my use, a title to the aforesaid 600 acres of land, and securing the consideration money therefor, to the aforesaid Charles Williamson.' I have no hesitation in saying, that Faulkner was authorized to execute the mortgage with the power to sell, which it contained.

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Mortgage as used in power, means instrument in use as a mortgage, where power was to be executed.

Practice in this state was to incorporate power of sale.

Faulkner, therefore, did not exceed his power.

2. Although the presumption is strong, that the purchase was abandoned, before the year 1800, and the agents of the estate proceeded upon that ground in selling parcels of the premises, yet there is no evidence of such abandonment, but what is deducible from the acts of the agents, and the acquiescence of Wilson; but as notice of those acts is not brought home to him, he ought not to be prejudiced by them. Besides, if there was an abandonment, it appears to have been waived by the subsequent application made by Troup to Wilson, for a release of the equity of redemption.

3. In my judgment, therefore, the rights of the parties must rest on the regularity of the foreclosure. To this it is objected, that the power of attorney from Wilson to Faulkner was not recorded according to the provisions of the act concerning mortgages. (1 R. L. 372.) The answer given to this objection is, that the power was actually recorded, before the sale—that this being considered irregular, as the

Rights of parties rest on the regularity of foreclosure.

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Recording
powers after
sale was e-
nough as a-
gainst mortga-
gor,

Who has no
right to object,
though not re-
corded.

proof upon which it was recorded had been taken out of the state, it was afterwards regularly proved, and again recorded. The same difficulties are raised as to the power of sale. Although, the recording was after the sale, there can be no doubt that it is sufficient to sustain the previous proceedings. The question as to the latter power, I consider settled by this Court in *Bergen v. Bennet*, (1 Caines' Cas. in Err. 17.) It was there decided, that the omission to record the power will not affect the proceedings as between the mortgagor and mortgagee. The recording is for the benefit of the purchaser, to protect him against other purchasers or creditors; but the objection cannot be made by the mortgagor.

I concur in the result of the opinions delivered, that the circumstance of Troup's having conveyed a portion of the mortgaged premises did not divest him of the power to foreclose, as the administrator of Sir William Pultney.

Testimony of
Haight was
rightly sup-
pressed by
chancellor.

In the view which I have taken of this controversy, it does not become important to express an opinion as to the competency of S. S. Haight's testimony. I have, however, no doubt that the communications made to him by Troup, in relation to the foreclosure, are to be regarded as confidential communications between attorney and client; and that the Chancellor was correct in suppressing them.

On the whole case, therefore, I am of opinion that the decree of his honor the Chancellor be affirmed.

Decree unani-
mously affirm-
ed.

The Court being *unanimously* of this opinion, it was, thereupon, ORDERED, ADJUDGED and DECREED, that the decree of the Court of Chancery be affirmed, with costs to be taxed; and that the record, &c.

[The following case should have been inserted as of the September session, 1823.]

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Dec. 1823.

CHAMBERLAIN and others, appellants.
against
FITCH, respondent.

Chamberlain
v.
Fitch.

In the court of errors, a stipulation between the attorneys, solicitors, or counsel in a cause, is binding, though not reduced to writing.

Default, obtained in violation of such an order, set aside, with costs.

An irregular order, reversing the decree of the chancellor, in consequence of which the papers in the cause are remitted to the court of chancery, set aside, and the register of that court ordered to return them to this court, that the cause may proceed.

But the order here, being to reverse an order in the court of chancery, dissolving an injunction to stay proceedings on a judgment and execution at law, upon which the money had been collected, and paid over to the attorneys for the plaintiff there, (the respondent here,) the rule setting aside the default was so modified as not to take effect till those attorneys stipulated, that in the event of a reversal of the chancellor's order, the money so collected and paid to them should be placed at the disposal of the court below.

Form of the rule for this purpose.

SEPT. 11, 1823. *S. Stephens*, for the respondent, moved to set aside a default for not answering the petition of appeal in this cause; and for a rule requiring the Register of the Court of Chancery to send back to this Court all the papers, rules, orders and decrees, relating to the appeal, which were remitted by this Court on obtaining the default; and that the respondent have leave to proceed in the cause, as if no default had been entered.

The default (as appeared by the affidavits) had been taken under the following circumstances: The respondent (being then and still insolvent) obtained a judgment at law against the appellants, in the Common Pleas of Washington county. The appellants filed their bill, in the Court of Chancery, for relief against the judgment, and obtained an injunction against proceeding thereon, which was afterwards, (Nov. 12, 1822,) on the coming in of the answer, dissolved. On the 12th Dec. 1822, on a motion for a re-hearing, the order dissolving the injunction was confirmed. Dec. 18th, 1822,

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the First Judge of Washington Common Pleas granted an order staying all further proceedings upon the judgment, on the part of the respondent, until the further order of that Court, upon paying the amount of the judgment into the hands of the Sheriff of that county, on the execution issued in the cause. Dec. 27th, 1822, the appellants appealed to this Court, from the order made upon the motion for a rehearing. Upon this state of the case, the counsel for the respondent, intending to move to quash the appeal, it was agreed between him and the counsel for the appellants, that the papers for that motion should be served when convenient for the respondent's counsel, and that they would have the motion disposed of before answering the petition of appeal. Notice of that motion was accordingly given, for the 3d Tuesday of Feb. 1823, but the motion was afterwards postponed, by agreement of counsel, for one week, and was then again postponed, by agreement, on request of the appellants' counsel, till it should be mutually convenient for both counsel to go to Albany, in order to attend to the motion. April 4th, 1823, the last day of the session of this Court, without giving any notice to the respondent, his solicitor or counsel, of his intention so to proceed, the counsel for the appellants moved for and obtained an order of this Court, reversing the order of the Chancellor dissolving the injunction, for want of an answer to the petition of appeal.

(s) Vid. 11
Rule of Sept.
18th 1818.

On the 13th Jan. preceding, the usual order had been obtained, to answer the petition of appeal in eight days, &c. (a) which was, with a copy of the petition of appeal, served on the solicitor for the respondent, on the 25th of Jan. last. It was upon an affidavit of these facts, that the order for a default was taken. Since these proceedings, the money received upon the execution had been paid to the attorneys of the respondent, on their giving security to the Sheriff to refund the same in the event of his being made liable for it. None of the above stipulations or arrangements were reduced to writing between the counsel. And

J. Crary, contra, took this last ground, among others, against the motion.

SUTHERLAND, J. Is there any rule of this Court requiring a stipulation between attorneys, counsel, &c. to be reduced to writing?

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Crary. I know of none.

SUTHERLAND, J. My impression is, that the verbal stipulations between the counsel were binding.

Verbal stipulation between attorneys, &c. of court of errors binding.

Crary. If the suit is reinstated, it should be completely so. The money should be placed under the control of the Court.

WOODWORTH, J. (this morning, Sept. 13th) adverted to the facts as above stated, and concluded by moving, and the Court thereupon unanimously adopted the following RULE:

Samuel Fitch, respondent,
ads.

Andrew Chamberlin, Jonathan Morey, Ebenezer Ingersoll, jun. and David Wheedan, appellants.

On reading affidavits and papers accompanying, and hearing the counsel

of the parties, ORDERED, that the default obtained against the respondent, for not answering the petition of appeal filed in this Court, be set aside, with the costs of this application; and, further, that the Register of the Court of Chancery return to this Court the papers, rules, orders and decree relating to the appeal, which were remitted by this Court, on obtaining the said default; and that the respondent thereupon answer the said appeal—provided, nevertheless, that the preceding order shall not take effect until S. Stevens & S. B. Gibson, Esquires, attorneys for the respondent in the suit at law mentioned in the said affidavits and papers, shall have executed and delivered to the solicitor for the appellants, a stipulation that if the order of the Court of Chancery shall be reversed, on the said appeal, then, and in that case, they will deposit in the Court of Chancery, to the credit of the appellants in this cause, the amount of money received by them from the Sheriff of the county of Washington, on the

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execution issued on the judgment at law, and mentioned in the said affidavits and papers, subject to the disposition of his Honor the Chancellor.

WILLIAM JAMES, appellant,
against
DAVENPORT MOREY, impleaded with CALEB JOHNSON,
respondent.

At law, where a greater estate and a less meet, and coincide in the same person, in one and the same right, without any intermediate estate, the less estate is immediately annihilated, or, in the law phrase, is said to be merged.

This rule, at law, is inflexible.

And where the equitable and legal estates unite in the same person, the equitable is merged in the legal estate ;

But, in equity, the rule is not inflexible ;

It depends on the expressed or implied intention of the person in whom the estates unite, whether the equitable estate shall merge, or still be kept in existence :

Or upon the circumstance that he is not capable of making an election, being an infant, a lunatic, &c.

In the latter case, the equitable estate shall still be kept on foot ;

And so where it is for the interest of the person in whom these estates unite, the law will imply an intention to keep the equitable estate on foot,

Thus, where a mortgagee purchases or takes a release of the equity of redemption, the whole estate is vested in him, and the mortgage is extinguished ;

And with it the mortgage debt ;

Unless intention, incapacity to elect, or interest, &c., in the mortgagee, intervene to prevent the merger.

And where a mortgagee purchases, or takes a release of the equity of redemption in a part of the mortgaged premises, the mortgage is extinguished *pro tanto* :

And may be apportioned between the part, as to which it is extinguished, and the part in relation to which it exists.

Various acts, declarations and circumstances considered, which evince an intention to keep the legal and equitable estates distinct, or to unite them.

The recording an assignment of a mortgage is not necessary within any of the general registry acts :

It is, therefore, no notice to a mortgagor, so as to render payments by him to the mortgagee, in his own wrong ;

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Nor is it notice to a subsequent assignee of the mortgagee ;
Nor to a subsequent purchaser or mortgagee of the premises.

The assignee of a mortgage takes it subject to all the equities existing between the mortgagor and mortgagee at the time of the assignment; but not subject to the latent equities of third persons, unless the assignee have notice of such equities.

Payments made after an assignment, but before notice of the assignment is given to the mortgagor, must be allowed to him ;

But it is not necessary to the protection of the assignee, that he should give notice of his assignment to a subsequent assignee, or purchaser from the mortgagee.

Where on a judgment entered by confession on a bond and warrant of attorney, a specification of the consideration was not filed, pursuant to the statute of 1818, (*now repealed*,) whether the judgment is fraudulent and void as against a subsequent creditor by mortgage? *Quere*.

And, per Savage, C. J., a mortgagee is not a purchaser within that act. Woodward J., *contra*.

The meaning and extent of the term purchase, considered, at law and in equity. Per Woodward, J.

A mortgagee cannot hold the mortgage as security for any claim which he has against the mortgagor by bond or simple contract, &c., beyond the sum specifically secured by the mortgage.

Especially where an objection is interposed by a *bona fide* judgment creditor.

Yet a mortgage, to secure future advances, is valid ;

And it seems, that, as between mortgagor and mortgagee, a mortgage given to secure one debt, may become security for a debt subsequently contracted by the mortgagor to the mortgagee, where the former consents.

A *deed*, absolute on the face of it, but intended by the parties as a security merely for a debt, though registered as a deed, is valid and effectual between the parties, as a mortgage ; but it is liable to be defeated by a subsequent mortgage duly registered.

A mortgage, by way of an absolute deed, must be registered as a mortgage, in order to be effectual against subsequent *bona fide* purchasers or mortgagees.

The registering it as an absolute deed, is not sufficient for this purpose.

Where the equity of redemption is merged by being united with the legal estate in the hands of a mortgagee, &c., an assignment by the words *grant*, &c., may enure as a conveyance in fee, if not restrained by the *habendum*. Per Woodward, J.

English doctrine of tacking, and whether it extends to mortgagors and creditors, considered, per Woodward, J.

Meaning of the word *estate*, in lands, &c. Per Sutherland, J

Can be no merger unless *estates* meet. Per *id*.

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The registering a deed of conveyance is not notice to a subsequent purchaser, except in cases where its registry is made necessary by statute. e. g. Registering a sheriff's deed is not notice. . Per id.

Whether one having a recorded mortgage, standing silently by, and seeing another bid of the mortgaged premises on a judgment younger than the mortgage, forfeits his claim under the mortgage in equity? Quere. Per Sutherland, J. But, per Savage, C. J.: he does not; for the registry is notice to all the world.

One assigns as mortgagee: Whatever interest he afterwards acquires in the mortgaged premises, enures to confirm the assignment. Per Sutherland, J.

When an equitable estate is once merged by a union with the legal, it is gone forever, and cannot be revived. Per Cramer, Senator.

An order on reversal, including,

Form of order of reference to a master, to ascertain and report balance due on mortgage, &c.—Order of sale of mortgaged premises.—How to dispose of proceeds,—to deliver title deeds, &c.—to deliver possession to the purchaser.

Of two unregistered mortgages, the oldest takes preference. Per Savage, Ch. Justice.

The second cannot take preference, unless registered; and not even then, if the second mortgagee have notice of the first mortgage.

APPEAL from the Court of Chancery. The bill in the Court below was filed by James against Johnson and Morey. Issue was joined, and proofs taken; upon which the cause was heard by the Chancellor, who decreed in favor of the defendants. From this decree James appealed.

The facts material to the various points raised by the counsel, and decided, both by the Court below, and in this Court, are stated in the opinions of the Judges, and of Cramer, Senator.

The report of the same case as adjudged in the Court below is in 6 John. Ch. Rep. 417. The title there in *James v. Johnson and Morey*.

The late Chancellor assigned his reasons for the decree in the Court below, as in 6 John. Ch. Rep. 420 to 434.

J. V. Henry, for the appellant, opened the case very fully, and concluded by stating and commenting upon the following points:

1. The appellant, is the assignee of the mortgage of the 24th of June, 1817, from Caleb Johnson to James O. Wattles,

in good faith, and for valuable consideration, having acquired his security, not by any unfair *traffic*, but in the honest and ordinary course of mercantile transactions.

II. Notwithstanding the Sheriff's sales to James O. Wuttles and William H. Sabin, that mortgage was still a subsisting mortgage, and the assignment thereof to the appellant, on the 9th of November, 1818, was a valid assignment.(a)

1. Because the sales made by the Sheriff were, in construction of law, (the mortgage being unpaid, and satisfaction not entered on the registry thereof,) and in fact, subject to the mortgage.

2. Because, there was not a union of the entire legal and equitable estates, in either of the purchasers.

3. Because it was not the intention, at the time of the Sheriff's sales, that there should be a merger, inasmuch as the whole estate mortgaged was inadequate to the payment of the mortgage debt, by about \$2372; and inasmuch as Wm. H. Sabin was suffered to purchase one-fourth of the estate, worth \$2000, for the nominal price of \$205.

4. Because, it is the established doctrine of equity, to extinguish, or preserve a charge, according to the actual, or presumed intention, and interests of the person in whom the estates are united, and never to hold a charge as merged, but where it is perfectly indifferent to such party, whether the charge should, or should not subsist.(b)

5. That under this doctrine, a merger ought not to be suffered, as satisfaction of the mortgage debt, from the inadequate value of the mortgaged premises, has not, and cannot be set up; and yet by the extinguishment of the mortgage, it is plain, that any action on the bond accompanying it, would be either lost altogether, or the measure of recovery upon it rendered uncertain and unascertainable.

6. That a merger would, besides its direct repugnancy to the assignment of the mortgage, and the express covenant by Wuttles, that \$12,000 were due thereon, be a fraud upon the appellant, by depriving him of the pledge, though he took the assignment, for a full and valuable consideration, without the pretence of knowledge of any facts to impair,

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(a) *Jackson*
v. *Hull*, 10
John. 481

(b) 1 Cruise's
Dig. Tit. 8 ch.
2, s. 32. *Powell*
v. *Morgan*,
2 Vern. 90
Awdley v.
Awdley, id.
193. Arg. *Thomas*
v. *Kemish*, id. 348.
Lawrence v.
Blatchford, id.
457. 15 Vin.
ab. merger (A)
5 T. Raym.
37. Arg. *Philips*
v. *Philips*, 1 P.
Wms. 41. Arg.
2 Fonbl. Eq.
ch. 6, s. 8. *Ld.*
Compton v.
Oxenden, 4
Br. Ch. Rep.
397. 2 Ves.
jun. 261. S. C

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(c) 1 Fonbl.
Eq. B. 1, ch.
4, s. 25. *Earl
of Pomfret v.
Ld. Windsor*,
2 Ves. sen.
486.

(d) Com.
Dig. Estoppel,
(B.)

or invalidate it, and before the respondent, Davenport Morey, had acquired any interest whatever in the mortgaged premises.

7. That the conveyance from William H. Sabin, on the 26th of March, 1819, of the one-fourth of the premises bought by him at the Sheriff's sale, to James O. Wattles, can form no ground for decreeing a merger; because that conveyance was subsequent to the assignment of the 9th of November, 1818, (c) which not only James O. Wattles, but Morey, who came in afterwards under him, are estopped from gainsaying, (d) and from which estoppel, there can be no relief in equity, against a *bona fide* assignee for valuable consideration.

8. That the doctrine of the extinguishment of a mortgage, by the purchase of a part of the premises by the mortgagee, is utterly subversive of the rights and security of mortgagees, and if countenanced by any of the principles of the common law, would be one of the strongest illustrations, of the necessity and propriety of the rule in equity, preventing such extinguishment.

9. That the decree, if there can be a merger *pro tanto*, is erroneous, relative to Sabin's purchase, as, in him, there was no legal estate, into which the equitable could sink: and the assignment having passed the mortgage, as to this portion, to the appellant, could not be defeated by the after conveyance of Sabin to Wattles. Therefore, the moneys to arise from the sale of that portion of the mortgaged premises, at least, should have been decreed to the appellant.

III. That all the testimony relative to the parol declarations imputed to Wattles, at, or before and after the Sheriff's sale on the 20th April, 1818, about his title, or relative to the release of the equity of redemption from Caleb Johnson, can have no operation upon this case, such testimony being incompetent in itself, and especially in reference to the appellant's rights. (e)

(e) *Jackson v. Sherman*, 6 John. Rep. 19. *The Same v. Vredenburg*, 1 id. 158. *Fox & Pryn v. Reil & Reil*, 3 id. 477, is, that if there be a subscribing witness, he should be produced, &c.

IV. That, even if the Sheriff's sales, and the conveyance from Sabin to Wattles, should be deemed to have united the legal and equitable estates in him, yet, by his assignment to the appellant on the 9th of November, 1818, the premises described in the mortgage are expressly *granted, bargained, and sold* to the appellant, his heirs and assigns forever, and his title thereto became absolute by estoppel, against Wattles, on the 26th of May, 1819, when Sabin conveyed to him, and against Morey, who came in under Wattles, on the 14th June, 1819.

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V. That the appellant was not bound to record the assignment from Wattles to him, or to give notice of that assignment, to any person but the mortgagor.

1. The principle, that renders valid all dealings with the mortgagee, before notice of the assignment, drawn from *Williams v. Sorrell*, (4 Ves. 389,) respects dealings between the mortgagor and the mortgagee, before notice of assignment to the former, and has, and can have no relation to dealings between the mortgagee and other persons, to whom, from their being necessarily unknown, notice would be impracticable.

2. That, if the registering act relative to the military bounty lands, applied to the present case, the recording of the conveyance from Wattles to Morey, as an absolute deed was fraudulent and void ; and, it not having been registered as a mortgage, according to the act concerning mortgages, (1 R. L. 373, § 2 and 3, the provisions in which have been re-enacted and continued from the colonial statute, and have always been co-extensive with the state,) could not defeat, or prejudice the appellant's title as a *bona fide* purchaser or assignee, the provision being, "that no mortgage, *nor any deed, conveyance, or writing in the nature of a mortgage*, shall defeat or prejudice the title or interest of any *bona fide* purchaser of any lands, tenements, or hereditaments, *unless the same shall have been duly registered, as aforesaid,*" i. e. as a mortgage. Registering it, as an absolute deed, was a fraud. (*Coterell v. Purchase*, Cas. Temp. Talb. 61. Bac. Tracts, 37.)

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3. That the act, however, of the 17 sess. c. 1, 1 R. L. 209, relative to military titles, has been inadvertently applied to the present case. It extends solely to the lands granted as military bounty lands, of which the Onondaga reservation was not a part, and therefore did not fall within that act: nor was the reservation included in any other act for recording deeds, until the statute of the 23d of March, 1821, (sess. 44, c. 136,) was passed, which made it necessary to record deeds, that should be executed after the 1st of July following, in any wise affecting the right or title, in law or equity, to lands in the towns of Onondaga and Salina. The very foundation upon which the decree is made to rest, is subverted by this misapplication of the registering act respecting military bounty lands.

VI. That the judgment of the appellant against Wattles, entered upon a bond and warrant of attorney, *executed at the same time with the assignment of the mortgage*, for which the latter was a collateral security, and docketed on the 12th day of November, 1818, is a valid and subsisting judgment and entitles the appellant to a priority out of any funds to arise from a sale of the mortgaged premises, as Morey had actual notice of that judgment, before the conveyance to him by way of mortgage, and was not a *bona fide* purchaser of the premises, for valuable consideration, within the meaning of the statute passed 21st April, 1818, avoiding judgments as *fraudulent, as respects any other bona fide judgment creditor, and bona fide purchaser, for valuable consideration.*(f)

(f) 1 R. L. 500, s. 1. Id. 370, s. 4, which treat case of purchaser and mortgagee as distinct. Bac. Ab. Execution, (I) shows the same distinction in British statutes. Sugden, L. V. Phil. ed. 498, same distinction.

VII. That the appellant's legal title cannot be postponed, or defeated, even if the equity of the parties were equal, and most unquestionably cannot, when the whole equity of the case is against the respondent.

1. Because the respondent, in his first answer, filed on the 24th of April, 1821, falsely set up his deed as an absolute purchase, and thereby kept its real character concealed, until the appellant amended his bill, and the respondent was thereby obliged to discover, that it was a mortgage to indemnify him as the endorser of Wattles, upon a note for \$5000, at the Auburn bank, and to save harmless the respondent and Thomas I. Gilbert, from their bond to Amos P.

Granger, to indemnify him from the debts and claims against the late firm of Wattles & Granger; and besides, that Wattles had for the same purposes and at the same time, by an instrument in writing, under his hand, dated the 14th of June, 1819, assigned all his share of the partnership goods and effects in the firm of D. Morey & Co., and also all the personal property belonging to him and then in the use of D. Morey & Co. at their distillery, ashery, store and shop in Onondaga to the respondent.

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2. Because the respondent, whatever may be believed about his ignorance of the assignment of the mortgage to the appellant, had, at the time of the transactions last mentioned, a perfect knowledge of the judgment in favor of the appellant against Wattles; and that it had been entered to secure the payment of merchandize to the amount of \$9331, sold by the appellant to John Meeker; and that \$8369 58 of Meeker's goods, besides a parcel, amounting to \$1248 75, which Wattles had bought from William James & Co., were put into the store of D. Morey & Co., when that partnership was formed in Nov. 1818, as a portion of Wattles' stock.

3. Because there was a large surplus of the personal property which passed under Wattles' assignment to the respondent, beyond what was necessary for the payment of the note at the Auburn Bank, the debts that were paid by the respondent against the firm of Wattles & Granger, and even the full estimated amount of those debts contained in exhibit E, produced by the respondent.

4. Because it would be most unjust against the appellant, to change the security, for a specific indemnity under the deed and assignment of the 14th June, 1819, into a security for any balance which may be found due from Wattles to the respondent upon account; especially, "with liberty to the master to assume the adjustment and settlement in the pleadings and proofs mentioned as having been made by Azariah Smith, if the same should appear to him to have been fairly made and assented to;" as there is no allegation by the respondent, nor any proof, that an agreement to that effect was ever made; as, if it had been made, it could not have been

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obligatory on the appellant ; and as the principal part of the charges on the debtor side of that adjustment, after the 14th of June, or 21st of July, 1819, are for the assumption and payment of debts for Wattles, out of the indemnity and out of the partnership business.

5. Because the respondent, in Dec. 1819, and upon other occasions, in treaties for the sale of the mortgaged premises, expressly recognized the appellant's lien and right, and broke off his treaty for the purchase of the premises, in Dec. 1819, because Wattles could not obtain a release thereof from the appellant's judgment.

VIII. That, upon the admission of all the principles entering into the decree, there is error in not having directed the respondent, who has been in the actual possession of the mortgaged premises, to account for the rents and profits, since the last charge of rent in the adjustment of Azariah Smith.

T. A. Emmet, (same side) to show that the registry of the assignment to James, not being made necessary, nor any specific operation assigned to it, by statute, could not operate as notice to Morey and would, therefore, have been nugatory, referred to *Morecock v. Dickens & others*, (Ambl. 678,) *Bushell v. Bushell*, (1 Sch. & Lef. 103,) *Latouche v. Ld. Dunsany*, (id. 157,) *Underwood v. Ld. Courtown*, (2 id. 64,) and *Pentland v. Stokes*, (2 Ball & Beatty, 75.)

As to the construction of the words *bona fide purchaser*, he cited *Dunham v. Dey*, (15 John. 555) and he read that part of the opinion of Mr. Justice Platt which relates to this point, (id. 568, 9, and 570.)

H. R. Storrs & T. J. Oakley, contra. We shall contend, that the decree, of the Chancellor, in this case is correct and ought to be affirmed for the following, among other reasons :

I. That the judgment of the appellant against James O. Wattles, was fraudulent and void, by the act, (41 sess. ch. 259, s. 8,) for the want of a legal specification, and cannot be set up to affect the rights of the respondent under the convey-

ance of Wattles to the respondent on the 14th of June, 1819.(g)

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1. The defendant is a "*bona fide purchaser for a valuable consideration*," within the true construction of the act.(h)

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2. The amended specification, filed the 21st of August, 1819, subsequent to the conveyance from Wattles to the respondent, cannot aid the judgment; and especially as the liabilities of the respondent for Wattles were assumed before the respondent had any actual notice of the existence of the judgment.

(g) *Lawless*
v. *Hackett*, 16
John. 149
Brinkerhoff v.
Marvin, 5
John. Ch. Rep.
320.

II. If the appellant relies on the judgment, he has a clear remedy at law to enforce it, and the bill cannot be sustained for that purpose.(i)

(h) 2 Bl.
Com. 241.
Chapman v.
Emery, Cowp.
278. 4 Cruise
Dig. tit. 32,
Deed, ch. 22, s.
38, 49. 1 Eq.
Cas. Ab. 353.

He has acquired no right under the judgment which a Court of Equity will sustain as a subject of jurisdiction between the parties.

(i) 4 John.
Ch. Rep. 680.

III. The mortgage from Caleb Johnson to Wattles was merged and extinguished, by a deed to Wattles from Caleb Johnson, which is sufficiently proved to have been executed previous to the Sheriff sales of April 20th, 1818.

IV. If such deed is not deemed to be proved, then the mortgage was extinguished by the sale of the Sheriff and deed to Wattles, of the 20th of April, 1818, as to all that portion of the premises purchased by Wattles at said sales.(j)

1. A purchase, at Sheriff's sale, of the mortgaged premises, by the mortgagee, vests the entire legal estate in the mortgagee.

(j) *Garaner*
v. *Astor*, 3
John. Ch. Rep.
53. *Forbes* v.
Moffatt, 18
Ves. 384.

2. By the purchase of Wattles, the entire legal and equitable estates were united in him.

3. The acts and declarations of Wattles, before and after the sale, manifestly prove that intention.

V. The mortgage, being thus merged, could not afterwards be set up as subsisting—and the subsequent assignment to the appellant passed no interest therein, the appellant who claims under Wattles, being estopped in equity from setting up the mortgage.

VI. The appellant, having neglected to record or register the assignment of the mortgage from Wattles to him, and the respondent having had no notice of such assignment,

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before he took the conveyance of June 14, 1819, from Wattles, cannot now set up the mortgage (if subsisting) as to any part of the premises.

1. The appellant, having given no notice of the assignment, cannot more avail himself, or set up any other rights, as against the respondent, than Wattles himself could have done.

2. The appellant, by neglecting to record the assignment, and permitting Wattles to occupy the premises, claiming an absolute title therein, put it in the power of Wattles to impose on the respondent, or others, by inducing them to believe that the mortgage was extinguished, and that Wattles was the owner in fee of the premises.

3. The equity of the respondent is, at least, equal to that of the appellant, and the Court will, therefore, not interfere, but leave the appellant to enforce his rights, (if any he has) at law.

4. The conveyance of the 14th of June, 1819, to the respondent, became absolute in Dec. 1819, by the agreement between Wattles and the respondent.

VII. If the conveyance to the respondent, of the 14th June, 1819, is not considered as having become absolute, but if a mortgage, then it is to be preferred to any interest acquired by the appellant.

1. Because the assignment to the appellant was not registered or recorded, before the execution or recording of the conveyance of the 14th June, 1819, to the respondent, and the respondent had no notice of such assignment before the execution of such conveyance. (k)

2. Because it was not necessary that the second mortgage should have been registered or recorded, before notice of the assignment to the appellant, if taken without such notice.

VIII. The respondent, on the whole case, has a right to retain his prior lien on the premises, as a security for the amount found due to him from Wattles, in the settlement by Smith, being \$4,282 80, with interest; and also for the sum of \$1,598 26, and interest, being the amount of five items of account, not included in the said statement, viz.

(k) *Williams*
v. *Sorrell*, 4
Ves. Jun. 389
Johnson v.
Stagg, 2 John.
Rep. 524.

1. Cash paid on the bond to A. P. Granger, on account of the debts of W. and G.	\$1000 00	ALBANY, Dec. 1823.
2. Moneys collected by W. of James Norris,	551 13	James
3. A hat of Delamater,	8 00	v. Morey.
4. Lydia Babcock, acct. recd.	33 55	
5. A. Lall's acct. recd.	5 58	
	<hr/> \$1598 26	

Which sums are now proved in the evidence, and may be allowed, on a reference.

They added, that any actual notice of James' judgment must be altogether unavailable; because it was fraudulent, and the same act which carried notice of the judgment, conveyed the information that it was a nullity.

If, as contended, the assignment operated as a deed of conveyance, and thereby passed all Wattles' legal estate, why does the appellant come into a Court of Equity? His remedy was at law, and having the entire legal estate, an action of ejectment would have answered him every purpose. But the contrary is plain, both from the recital and the *habendum* in the assignment, which is confined to Wattles' interest as mortgagee.

The declarations of Wattles were offered in evidence as being those of a tenant in possession, to show the character in which he claimed. Declarations are always admissible, even at law, under such circumstances.

In relation to the 3d point they remarked, that the general rule, as deducible from all the cases, is, that where the legal and equitable estates unite, the latter is merged in the former.^(l) This rule is invariable, and without exception at law, wherever a greater and less estate meet in the same person;^(m) but it is admitted there are exceptions in equity. These are, first, where there is an intention to keep the estates separate, avowed at the time of their union: second, where the one in whom they unite is interested in keeping them separate. But where this is indifferent to the party, or where the intention to keep the estates distinct is unknown to third persons, who act on the faith of an extinction, there shall be a merger. These distinctions are fully

^(l) *Gardner v. Astor*, 3 John. Ch. Rep 53.
^(m) 2 Bl. Com. 177, 178

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(n) 6 John.
Ch. Rep. 423,
4.

(o) And vid.
2 Fonbl. B. 2,
ch. 6, s. 8.

(p) 2 Bl.
Com. 177.

(q) 1 P. Wms.
41.

(r) 2 Fonbl.
B. 2, ch. 6, s.
8.

(s) 2 Vern.
348.

(t) 2 Eden's
Rep. 162. And
vid. n. (a) to
this case, p.
164

(u) 1 Br. Ch.
Rep 363.

supported by the cases on which the Chancellor(n) relies, of *Compton v. Oreden*, (2 Ves. Jun. 261,) *Thomas v. Kemish*, (2 Vern. 348,) and *Forbes v. Moffatt*, (18 Ves. 384.(o))

When once the estate is merged, it is gone forever; or, in the language of Blackstone,(p) it is "annihilated," and "shall never exist any more." It is enough for us to establish this union of estates; which is, *prima facie*, a merger in equity. If the opposite party mean to show it an exception, he must do so by establishing an intention in Wattles to keep up the separation. Something to this effect must be done at the moment of the union, not after. Any subsequent act, like the assignment to James, will avail nothing as evidence of the intention; for the merger being perfect, it cannot be done away. The remark in 2 Fonbl. B. 2, ch. 6, s. 8, note (a), that mergers are odious in equity, and never allowed except for special reasons, rests upon *Philips v. Philips*,(q) where the language of the Court was entirely gratuitous. "If a man," says Foulblanque,(r) "has the same interest, and absolute dominion and property in the whole inheritance, as he has in the term or power for raising money out of the inheritance, there it must merge." This remark is directly applicable here, as is plain from the exception mentioned by the same author. In *Thomas v. Kemish*(s) cited by him, there was no union of the legal and equitable estates. There was a term outstanding in trustees; and so not merged in law, nor, consequently, in equity. In *Donnithorpe v. Porter*,(t) the ground taken in *Thomas v. Kemish* is rendered still narrower, it being determined that where a person has a right to a sum of money charged upon an estate, and secured by a term of years, and afterwards becomes entitled to the fee simple of the estate, a Court of Equity extinguishes the equitable lien, except in the case of creditors or of infancy. We also refer to Gilbert on Uses and Trusts, by Sugden, p. 28, n. (3), and the cases there cited. One of the authorities mentioned there is that of *Wade v. Paget*.(u) In that case the Ld. Chancellor said, "that during the twelvemonth, the infant survived her mother, she had the legal estate in fee in one moiety, as well as the equitable estate in fee by the

sovenant ; and that it is universally true, that where the estates unite, the equitable must merge in the legal." (v)

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It may well be that James shall hold a part and Morey a part. Sabin's purchase was distinct from Wattles', and grounded on a distinct judgment ; and he continued seised till after the assignment. But Sabin acquired the absolute title to the premises discharged of the mortgage. The judgment upon which he purchased was in favor of Wattles for a portion (\$2000) of the mortgage money. Wattles stood by, saw the sale, forbore to give any notice of his own incumbrance and could not have afterwards set it up against Sabin. He conveyed this perfect title to Wattles, who conveyed to Morey ; so that the title to the whole passed to the respondent. In short, Sabin's purchase discharged the premises from James' mortgage, and being conveyed to Morey, he can hold it quit of the incumbrance. Nor does it vary the case, that Sabin's conveyance to Wattles was after the assignment. It enured to our benefit, for want of proper notice that James had an assignment.

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(v) Id. 367, 8

It may well happen, that a mortgagee may wish, on purchasing the equity of redemption, to avoid a merger in order to save his own title against intervening incumbrances. In that case alone, will a Court of Equity allow him to do it. But there is no doubt that, at law, there is a clear merger of what was purchased by Wattles ; and the conveyance conferring on us a legal title, a Court of Equity will never take this out of our hands, especially when they see that we have the best pretence of good faith. (w) The man who has the legal right shall hold, unless you fix him with notice. This is the language of all the cases. We bought, acting upon this legal presumption. Wattles was in possession, claiming to be owner and offering to sell, holding a full and complete conveyance of the equity of redemption, and clothed with all the requisite evidence of title. Was Morey bound to guard against an unknown assignment—nay, one which had been wilfully, or, at least, carelessly concealed from him, against the strongest ostensible evidence of ownership ? Morey acted on the faith of a recorded mortgage, judgments, executions and sale, public documents, showing a complete extinction of all equitable claims.

(w) Johnson
v. Stagg, 2
John. Rep.
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However fairly 'James may have acted, the parties must stand or fall by those general principles, which have governed, and must still continue to govern thousands.

Admitting the equity to be equal, who has trusted most? Who has been most vigilant? James' assignment was not recorded. It rested quietly in his pocket or his counting room, and even Johnson, the mortgagor, was never made a party to it.

It is said the entire legal and equitable estates have not united in Wattles. The counsel did not mean to say so. He meant to say that the whole estate in the *whole land* had not united. The land and the estate are distinct. It is enough, that the whole estates, *in part*, have met. Suppose a man owning two farms, mortgages them, and the mortgagee takes a release, or buys in one of them; what reason is there against a merger *pro tanto*? True, there must be a union of the whole legal and equitable *estate*, but need not be as to the whole land. Take the case of tenant for life, with a vested remainder in fee; and a mortgage by the tenant for life. A purchase of the remainder by the mortgagee will not extinguish, because he does not reach the whole estate. So, should he purchase in the estate for life, holding a mortgage of the remainder. But the case of the two farms is directly the reverse, and presents the precise instance in which the equitable estate shall merge as to a part of the land. The difficulty which has been stated in relation to adjusting the balance, always intervenes when the mortgagee buys in the equity of redemption, whether it result in a merger or not. The Chancellor will provide for this in the order for an account. A mortgagee in possession is always liable to account. In

(x) 2 Ventr
327

(y) Vid. Vin.
Merger, (G.)
1.

Wade v. Paget, there was a partial merger; and in *Dighton v. Greenville*, (x) Ventriss, Justice, said, "If a lessee for years purchaseth the reversion of part, the lease holds for the rest." (y)

We agree, that neither side could have acquired any rights by the recording of their respective conveyances; that the registry acts are inapplicable; and that the Chancellor was incorrect in treating Onondaga as a recording county. But the assignee of a mortgage takes it subject to all the existing

equity between the mortgagor and mortgagee.(z) So as to all persons claiming under them. Suppose Johnson had sold to one, who, without knowing of the assignment, had paid off the mortgage, it would be a discharge.

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[*Henry.* This we have admitted in terms.]

Morey then bought of Wattles. But notice to the latter did not affect the former. He was protected by his own good faith, and want of notice. This is the familiar and settled doctrine of a Court of Equity; and puts an end to this case. Morey proceeded in the most perfect good faith to incur responsibilities, and take this security. Suppose after he had taken the mortgage, Wattles had released to him his equity of redemption, without his having notice of the assignment, would not his estate have been absolute and indefeasible, both at law and in equity, notwithstanding the secret claim of James? This would be equivalent to the admitted case of payment without notice of the assignment, and this is the ground upon which the case is properly put by the Chancellor. It is under this notion that Morey may hold. The equity of redemption is virtually claimed under Johnson. It is a fair corollary from the case of *Williams v. Sorrel*, that James cannot set up the mortgage against any one to whom Wattles could not oppose the same mortgage. Wattles could not set up this mortgage against Morey.

(z) *Cruick
Dig. Mort-
gage, ch. 2, s
33, 4. Wil-
liams v. Sor-
rel, 4 Ves.
Jun. 389.
Murray v.
Gouverneur &
Kemble, 1
John. Cas.
438. Clute v.
Robinson, 2
John. Rep.
595.*

But at any rate, James must have had notice of Wattles' title. Every man is chargeable with constructive notice of the true title which is vested in the possessor of lands.(a) In *Berry v. The Mutual Insurance Company*,(b) it is said, that "a second mortgagee, who neglects to have his mortgage registered, will not be relieved against a prior unregistered mortgage, unless, from the non-delivery of possession, or other circumstances, imposition has been or might be practised on him, which could not be detected or guarded against by the exercise of ordinary diligence." And in *Goodtitle v. Morgan*,(c) Buller, J. says, "It is an established rule in a Court of Equity, that a second mortgagee, who has the title deeds, without notice of any prior incumbrance, shall

(a) *Daniels
v. Davison, 16
Ves. 249.
Taylor v. Stib-
bert, 2 id. 440.
S. P.
(b) 2 John.
Ch. Rep. 613.*

(c) 1 T. R
762.

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be preferred; because, if a mortgagee lend money upon a mortgage without taking the title deeds, he enables the mortgagor to commit a fraud." And though this particular result may have been overruled, yet the reason and ground of the remark has not been overruled. Wattle took possession as owner, shortly after the Sheriff's sale, with all his muniments of title about him, owning in fact, and claiming as owner, of which James was bound to take notice; and of which Morey is entitled to the full advantage.

We have shown that the remedy should be at law, if the assignment is to take effect as a deed of conveyance. In such an event, you may, indeed, reverse our decree, but you can grant nothing to the appellant. He must be put to his remedy at law. We have also attempted to show that this cannot operate as a deed. We add, that it cannot operate by way of estoppel, because, at most, it was a mere quit claim, especially as to the part purchased by Sabin.

But suppose we are mistaken. Suppose the assignment does operate, upon any principle, as a deed. Now, considered either in this point of view, or as an assignment, it is not absolute, but a mere mortgage; and as such, must have been recorded, in order to take preference of the subsequent conveyance to Morey, who is a purchaser, *bona fide*, within the meaning of the registry acts. Each are *bona fide* mortgagees, at least, and Morey, having obtained his deed last, though not registered as a mortgage, is entitled to preference as against James, who neglected to register, till after Morey had purchased. We are aware that it was held otherwise by the late Chancellor, in *Berry v. The Mutual Insurance Company*,^(d) but the incorrectness of that decision must be apparent on an attentive consideration of the subject. What was the policy of the mortgage act? To give notice against the presumption of absolute ownership arising from the possession of the mortgagor. A man advances his money without the means of knowledge, unless there be a record. This applies to mortgagees as well as purchasers. In *Berry v. The Mutual Insurance Company*, the late Chancellor first decides correctly, that actual notice supersedes

^(d) 2 John.
Ch. Rep. 603.

the necessity of registry ; but the remark, that the omission to register the first mortgage was not capable of producing any mischief to third persons, who would use ordinary diligence and caution, does not accord with common experience. A party relies, and has a right to rely merely upon the record. True, there is no need of a registry, as between mortgagor and mortgagee. But the latter is bound to record merely to guard himself against subsequent, not precedent acts of the mortgagor. It is never a matter of confidence between them, that there is no previous mortgage. That man must suffer, by whose omission to record or give notice, a second mortgagee is imposed upon. This accords with the plain principle of equity, that the one who omits to do a legal act, by which another is misled, shall not set up his incumbrance to the prejudice of the one who is imposed upon. The second mortgage, therefore, may or may not be recorded in perfect consistency with the rights of the second mortgagee, so far as the first is concerned. No one dreams of recording, to guard against a previous secret, unregistered incumbrance.

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But the Chancellor(e) says, that "the mortgage act evidently speaks of purchasers, in the popular sense, as those who take an absolute estate in fee ;" and subsequent purchasers of this character alone, it seems, are to be protected. But it is plain that the application is no more to a purchaser in fee than to one for life or years. The terms are broad. No *bona fide* purchaser is to be prejudiced by the previous mortgage, unless registered.(f) The term *purchaser* embraces one who acquires any interest or estate by his own act. Suppose a first mortgage unregistered, and that another, not knowing of its existence, lends money on mortgage, and on his way to the Clerk's office, for the purpose of recording his own, receives notice of the first, and finds it recorded since the loan last made. Now the words of the act are, that the mortgage first registered shall have preference. Would you construe it literally, and thus defeat the second mortgagee? This would be gross injustice. The act cannot be, and never has been literally construed.

(e) Id. 612

(f) 1 R. L.
373, s. 2.

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(g) Id. s. 3.

(h) Vid. 6
John. Ch. Rep.
422.

(i) 1 Eq. Cas.
Ab. 353.

But, in the eye of a Court of law, we are purchasers. The appellant says we hold an equitable mortgage, or rather a conveyance which a Court of Equity will change into a mortgage. Is he to be tolerated in asking you to do this, and then calling on you to do iniquity, by giving him the benefit of the change, in taking away a precedent, vested, legal right? The act, (g) requiring a registry, does not extend to any case beyond a mortgage upon its face, or one made so by a written defeasance. Here our conveyance is to be turned into a mortgage by parol. If there be but a parol defeasance, it may be destroyed by parol, and was so destroyed by the subsequent bargain between Wattles and Morey, fulfilled on the part of the latter. (h) Has he not, the strongest equitable right to say, that as between him and Wattles, and him and James, he shall be considered an absolute purchaser? A mortgagee is a purchaser, not only at law, but in equity. (i)

Suppose that Morey did, in his first answer, set up his deed as an absolute conveyance: how could this injure James? The respondent was not bound to do otherwise upon any principle. The bill was one of foreclosure merely; and, therefore, called for no explanation of the deed. Being a *bona fide* purchaser, without notice, Morey might have demurred, or pleaded this fact in bar to any answer whatever. The bill did not charge that the deed was by way of mortgage. If it had done this, and we had not answered in that particular, the appellant should have excepted for this cause; nor would his counsel have been so remiss as not to have done this. The answer was, that the consideration for his deed had been equitably paid by Morey; and this was all that he was bound to say.

(j) Cas.
Temp. Talb.
61

But we are told, that because absolute on its face, our deed was fraudulent; and *Cotterell v. Purchase*, (j) was cited to bear out the position. But surely this is not the law of the land. A deed may, though absolute on its face, be an honest mortgage. The authority relied upon is grounded merely upon the ancient Law Tracts of Bacon. Such a practice may be a fraud in a moral sense, but no one, we believe, ever considered it a legal fraud. It cannot be the lat-

ter, unless it works some injury. . The cases cited do not profess to overturn the practice of taking mortgages in this form, but only to discountenance it. The case admits the practice of taking a separate defeasance to be an extensive one in the north of England, and discountenances this also. But our statute expressly recognizes it as valid and proper, and *Dunham v. Dey*(*k*) sanctions the right of giving mortgages, by way of an absolute deed, with a parol defeasance. James could not be injured by this form, for his conveyance was a prior one.

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(*k*) 15 John
555.

The decree, that Morey's deed shall stand for a general balance, goes upon the ground, that as he has gone on, in relation to all his responsibilities, upon the same good faith, he is, therefore, entitled to protection. As between Wattles and Morey, this would doubtless be the case ;(*l*) and the consequence is the same to James, from his negligence in omitting to give notice.

(*l*) *Jarvis v. Rogers*, 15 Mass. Rep. 389. *Skirrae v. Caig*, 7 Cranch, 34. 1 Mad. Ch. 425. *Hendricks v. Robinson*, 2 John Ch. Cas. 309. *Lowthian v. Hasel*, 3 Br. Ch. Cas. 162. 1 Eq. Cas. Abr. 324, 5 Mortgages, (G.) pl. 1, 2, 3, 4, 5, 7.

As to the rent of the premises, we agree that Morey should allow it : and we think it would be allowed, in account, before a master, under the decree. If not, the decree should be so modified as to let in this claim.

T. A. Emmet, in reply. The original bill was filed for a foreclosure, and, of course, the discovery and extinguishment of claims, that might prevent a perfect title being made to a purchaser under the decree. For that reason, the respondent was made a party to ascertain the nature of his claim, that it might be paid according to its rightful order, out of the purchase money on the sale, and be extinguished as respects the new purchaser. The answer claimed, on oath an absolute title. We then proceeded to show that the respondent's apparently absolute deed was only a mortgage, and state the reasons why the respondent's claim should not be preferred to that of the appellant ; and. if it could have any preference, within what bounds that preference should be limited. For both reasons, we set forth our judgment, and the circumstances attending it—not as affording any positive ground of relief here, but as meeting and destroying any claim the respondent might make to a preference over us. If it has that effect, then the prayer of our bill, for a

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sale on the mortgage, should be granted. If our deed is found not to be a mortgage, and that we must stand on our legal rights merely, and the efficacy of our judgment, as regards the respondent; then he having filed no cross bill, and prayed no sale, and the priority of our rights being strictly of legal cognizance, and ascertained there, the bill should be simply dismissed, without costs from the nature of the controversy.

In either and every case, this decree must be reversed. If our deed be considered as a good subsisting mortgage, or the respondent's rightful claim under his deed extinguished, then so far as it gives the preference in payment, out of the proceeds, to the respondent; and should an account be necessary, to ascertain the latter fact, then in so far as it directs the award made by Az. Smith^(m) to be made the basis of the account.

(m) The settlement mentioned in the case, 6 John. Ch. 434, and referred to ante, appellant's 7th point, reason 4th.

But should the court consider that we can only enforce our claim whatever it may be, through the judgment, then, the respondent having filed no cross bill and asked for no sale, the appellant's bill must be simply dismissed.

No fraud or misconduct is imputed to us. As to the respondent's mode of answering and disguising facts, I cannot be so liberal to him. But as to the justice of their debts, both stand in equal equity; and the only question is, 1. whether they stand in equal equity, as to the *security or remedy* for their equally just debts. 2. If they do, then, first, which of them is entitled to the benefit of the rule *qui prior est in tempore, potior in jure*? 3. Who has the legal estate, which in cases of equal equity, he cannot be called on to relinquish?

If it should be supposed that the two preceding points are in favor of the respondent, it then remains to inquire, whether the objects for which he may be entitled to a preference over the appellant, have not been so far accomplished, as that he can no longer interpose any impediments to enforce the appellant's remedy.

1. The parties do not stand in equal equity as to the remedy. The respondent's claim had no existence when the appellant dealt with Wattles. The appellant was totally ignorant that the equity of redemption had been sold at

Sheriff's sale, and of any of these circumstances which are alleged as to the extinguishment of the mortgage. If these objections should prevail, *he has been manifestly cheated*. The appellant's claim was in existence when the respondent dealt with Wattles, and known to the respondent. He knew of it, and its amount, (even if he was ignorant of its technical shape,) and intended to take his security subject to its being enforced. If it should be enforced then, he will not be cheated; but dealt with as he originally expected: and if it should not be enforced, he will gain a benefit he did not originally expect, through a fraud practised on the appellant. It is surprising that the Chancellor should think differently. He says the respondent used all requisite diligence. The diligence he used showed him the appellant's claim, the justice of which was indisputable, and the means by which it was secured, regarded as unquestionable.

But the respondent did not use *requisite diligence*. He omitted to make an inquiry, that no man should ever omit, and which, if he had made, would have discovered to him that part of the appellant's title, that he now says he did not know. He never required Wattles to show or give him up the original mortgage deed, which was necessary for making good the title he was taking, and to which he was entitled, either as a purchaser or mortgagee. He knew that the possession of the title deed should be had. He got all the other deeds. Why did he not ask for the mortgage deed? What he got, only showed that Wattles owned the equity of redemption. What evidence did Wattles give, that he continued to own the legal estate? This raises the presumption that he intended to deal about the equity of redemption only. All the facts of this case concur to show the same thing. What evidence did he give that he continued to own it when he purchased the equity of redemption? As an assignment of a mortgage need not be registered, the registry of the mortgage, or the want of registry of an assignment, cannot prove that fact. Suppose, before the Sheriff's sale, Wattles had assigned the mortgage to the appellant, or any other person, who never thought fit to do what no law requires him to do, by registering the assign-

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ment ; Wattles had then bought in Johnson's title, and made to the respondent the conveyance he has done. Could the respondent protect himself from the mortgage so assigned ? Nothing could show him that no assignment was made, but producing or delivering up to him the mortgage deed itself. The production of this alone would show that no fraud was committed, and its possession alone could guard against its being afterwards done. The Chancellor says he placed confidence in the ostensible owner, in one claiming to be the owner, and "*showing in himself the union of the legal and equitable titles.*" How did he show he had the *equitable* title ? In fact, he had it not ; and the conveyance, giving him the legal title, was for a valuable consideration, assigned by him to the appellant, together with the legal title. He never pretended to be owner after the assignment, but always avowed James' claim. All he said of ownership was before the assignment. The Chancellor says, that it was a matter resting solely in Morey's discretion, whether he would require the production of the mortgage or not. The consequences and existence of this suit, show it was an act of negligence. True, the law may not raise any presumption from thence against the *integrity* or *validity* of the purchase : but if he had a right to do it, if the mortgage was the very deed by the force of which only the legal estate was parted with by Johnson and vested in Wattles, it was a necessary title deed, and not requiring its production was negligence ; and without any imputation against the integrity of the transaction, it is clear that the respondent must bear the consequences of his own negligence. He did not bestow confidence on his partner as to the Sheriff's deeds, or the assignment from Sabin ; and can any reason be assigned why he did not take *all, or leave all, or ask* about the mortgage deed ? and it is to be presumed, that barely asking about it would have elicited the truth. The respondent, then, has not bestowed all requisite vigilance.

The objections against the appellant's equity as to the remedy, follow in the Chancellor's opinion.(n)

(n) Vid. 6
John. Ch. Rep.
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Can the appellant be charged with notice, or negligence, in not knowing "from the records" of the county which

contained the Sheriff's deed, that Wattles had purchased or extinguished the equity of redemption? He was not dealing with Wattles for that—had no reason to suspect or care about it, and the recording of deeds has never been held notice to any one. It is not the object of the recording acts. These were passed to preserve the evidence of titles, in which hundreds who cannot have the custody of the deeds, may be interested, and in some degree to facilitate the searches of those dealing on the subject matter. And could it be called negligence that he did not stop the negotiation till he sent to search the records of Onondaga county, to ascertain a fact that could not reasonably present itself to his mind? Is the Chancellor then correct when he says the appellant knew (which is entirely unfounded) or was bound to know, *for it was matter of record*, that Wattles had purchased? Its being matter of record only *gives him an opportunity*, but puts him under no obligation to make the search; and the position is contrary to *Morecock vs. Dickens*,^(o) *Bushell vs. Bushell*,^(p) and *Williams vs. Sorrell*.^(q) He did not take the mortgage, because he did not know of the Sheriff's sale; and if otherwise, it would not cover Sabin's purchase. But the assignment was not recorded, and for that reason the Chancellor calls the appellant a *secret assignee*, brands the assignment as a secret one and (what I do not understand) calls the mortgage itself a *suspicious instrument*. How suspicious? It at least was registered; and how was it calculated to put him on inquiry? But wherein is the assignment secret? Was the respondent's more public? Is any instrument ordinarily executed with more publicity? How was he to avoid the *secrecy*, for his own protection, as even the registry would not be notice, nor proclaiming it in Onondaga village? It was only an affair between Johnson, Wattles and himself. How does it appear he did not give actual notice to Johnson? Even as to him, registering the assignment would not be notice. (*Williams vs. Sorrell*, 4 Ves. 389.) It is not required by any law, and it would bind no one in his favor. *Arguendo*, in *Williams vs. Sorrell*, Mr. Pigott said, a subsequent purchaser or mortgagee would be bound to look; *but that is*

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(o) Ambl. 678.
(p) 1 Sch. &
Lef. 103.
(q) 4 Ves. 389.

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under the express words of the English statute. Why then should he be obliged to do an act that could avail nothing to the protection of his own rights, and is not by law required for the protection of others? The Chancellor says, "It was the *only* way in which Wattles could be prevented from practising a fraud." If so, why had not the law required it? But it is not the *only* way. The *only* way, is that habitually taken in England where, except in a few counties, there is no registry, and which every prudent man of business requires here—for the respondent to demand the mortgage deed, as a necessary title deed. If he had done it, Wattles could have practised no fraud, if he intended one; and as he omitted to do it, he, and not the appellant, should suffer by the omission. How by any one act, within the appellant's knowledge, was Wattles suffered to claim and deal with the land as the absolute owner? After the 9th November, 1818, he never proposed to sell without mentioning that the appellant's incumbrance must be paid. Would recording the assignment of the mortgage have prevented his claiming to be the absolute owner under the Sheriff's deeds, or Johnson's pretended quit claim? Public notice at Onondaga is talked of. Would public notice have bound any one to whom it was not specially brought home? It would have done him no good and is not required by any regulation, or law.

2. But supposing their equities equal, which is entitled to the benefit of the rule, *qui prior est in tempore potior in jure*? Clearly the appellant—1st. if his deed have any operation—or 2d. if the first specification of the judgment was valid—or 3d. if its invalidity was dispensed with from the respondent's actual knowledge of its existence.

First. That the deed has some operation, the Chancellor in his decree admits, when he directs the residue of the proceeds to be brought into Court for the appellant. It would be absurd to say it had no operation as against Wattles being *bona fide* and for a very full consideration, and it remains to see whether it has not the same against the respondent, who came in under Wattles after the rights between the appellant and Wattles were fixed; and came in, moreover, expecting to give to the appellant a preference for the very

claim, a part of the security for which is this very deed. The appellant's rights were fixed 9th Nov. 1818, but the respondent's did not commence till June 14, 1819.

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The objection to it is, that the mortgage is merged by the purchase of Wattles at Sheriff's sale; but it is confessed that even this cannot operate as to the part then bought by Sabin. That, therefore, seems now surrendered, and the decree must be *pro tanto* reversed. But we go farther, and propose to show that the objection has no validity as to any part of the property.

If there were any merger, the result would be, that the equity of redemption merged *in the legal estate*, without the possibility of being revived, and that it could not be enforced against him in whom was vested the legal estate. We do not contend for this absurd doctrine, though it is the legitimate deduction from the principles contended for on the other side. We say it has no existence at all, and admit that the recital and *habendum*, in our deed, perpetuate and secure the equity of redemption *as a benefit to Wattles* or his future assignees.

But the truth is, the *legal* doctrine of merger has no possible application here, or any where between a legal and an equitable estate. The confusion arises from an incorrect use of terms. A legal merger is only where a smaller and a larger *legal* estate meet in the same person. Then, by *operation of law*, the smaller estate sinks into the larger and is lost, *whether the owner of the larger estate wills it or not*. His intentions can have no possible effect in controlling this operation of law. Nor can a Court of Equity interfere with it, except where the smaller estate was created for some purpose that is peculiarly under the protection of a Court of Equity: As in the English settlements of estates, where long terms of years are created for raising portions for younger children. There, if the inheritance should descend on the trustee of the term, doubtless, a Court of Equity (without interfering with the legal merger, which neither a Court of Chancery nor a Court of law could control) would compel the trustee to perform the trust, if any objects of the trust still remained to be satisfied. *That is*

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the only case in which a Court of Equity can interfere with the consequences of a *legal merger*. But there is another case arising out of such settlements, in which no *legal merger* takes place, and a Court of Equity considers the trusts preserved or discharged, on fair equitable principles. Where the inheritance, instead of descending on the trustee of the term, has descended on the *cestuy que trust*, for whose benefit the trust was created. It there holds the trust preserved or discharged, according to the intention of the *cestuy que trust*, and if no intention be expressed or indicated, or from want of capacity cannot be permitted, it then presumes an intention from the party's interests. This is the result of all the cases.

The same is the doctrine where equity of redemption comes to belong to the same person who owns the legal estate as mortgagee, or assignee of the mortgagee. He has an equitable and a legal interest in the same lands, and both entirely under his control. If he has any wish or object for keeping alive and distinct the equitable estate, he has a right to do it, *no doctrines of legal merger interfering, which works all its effect by operation of law, neither consulting, nor permitting the intention of the owner to be at all regarded*. As in the cases of trust terms, if no intention be manifested by acts, the Court of Equity will presume it from the interest of the party, and where he has manifested no intention, and there is no interest or reason to keep it up, it will be held that the trust is extinguished. This doctrine

(r) 18 Ves.
384, 390.

is very clearly illustrated in *Forbes v. Moffatt*.(r)

But this extinguishment, in its principles, not only differs from the law of legal merger in the circumstance that the intention of the party is paramount, but also in this, that a legal merger having once taken place cannot be undone, and the estate revived, but the party controlling the trust and equitable estates, may change his inclinations and resolutions as often as he pleases, until some right of a third person shall be so created and vested as to make it inequitable that he should, in future, change his intentions. The impossibility of opening a merger at law is, because it is produced by operation of law, regardless of any one's intention. The

reason why in Equity it is in the power of the owner of the two interests, to change his intentions, while no vested interest of any third person is involved, is, that every thing depends on his will ; and, like his testament, he may change it to answer new views, or perhaps new family exigencies. A legal merger takes place, *eo instanti* the two estates unite—it cannot be stopt—it cannot be undone. But there is no precise or given time within which the owner of the two interests must elect whether they shall continue separate or unite. In *Forbes v. Moffatt*, the question, after the death of the party so situated, was tested and discussed by all the acts of his life for ten years. In *Powell v. Morgan*,^(s) the question was decided by the *last will* of the person so situated, and so in *Thomas et ux. v. Keymish*.^(t)

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^(s) 2 Vern
90.

^(t) Id. 348.

From this complete control of the owner, another principle follows, peculiarly applicable to this case. When the party is doing any act which would be a cheat or a fraud upon a third person, if the two interests were not kept separate, or *vice versa* if they were not combined, Equity will control his will to commit a fraud, and will force him to do what he has a right to do, so that he shall not cheat a third person ; and that third person having acquired a vested right, the mutability of the owner's intention is fixed by it.

The question, what is for the owner's interest ? seems to me not to arise, unless where its examination is necessary for the purpose of presuming an intention, where one has not or could not be expressed by the owner of the two interests. In this case, however, although the acts of Wattles have superseded the necessity of examining as to what his interests would be, it may, without injury to us, be resorted to. He had a clear and most direct interest, in keeping the two estates separate.

In this case, the equity of redemption could only sink under the presumption that Wattles intended to consider the trust entirely discharged: If so, then he could recover no part of it from Sabin's proportion of the mortgaged property ; and as Sabin would have contribution against Wattles' share, the consolidation of the two interests cannot be presumed, unless it appear that he intended to exonerate Sabin's

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(u) *Jackson*
v. *Willard*, 4
John. Rep. 41.

share of the land from all liability to the incumbrance. Otherwise the separation of the two interests must exist both for his and Sabin's benefit. But further, that property was a lawful fund by which Wattles might raise money.^(u) It is asked why he did not mortgage anew for that purpose, what he bought in? The answer is obvious, because then he could only have mortgaged three-fourths of the whole. Then, suppose the appellant, or any other person dealing with him for a loan, and even (what was not the case here) acquainted with his purchasing under the sheriff's sale, but knowing or believing that he could separate or unite the two estates according to his interest or pleasure; what would be the views of the parties? "Mr. Wattles, you want \$12,000; if you assign me the Johnson mortgage, as it covers the one-fourth purchased in by Sabin, I have no objection on that security to lend you to the full amount; but if you choose to consider the equity of redemption as merged in the legal estate, and to give me a new security, then you can only give me a security on the three-fourths purchased by you. I cannot lend you on that security at the very utmost more than \$9000." Indeed, in this very case, it is manifest, that if it was supposed Wattles could only give a security on his own three-fourths, it never would have been accepted by the appellant.

It was then clearly for his benefit that the two interests should continue disunited. What were his intentions? No expressions used by him which had relation to the pretended deed to him from Johnson, can apply to this point. If there ever was any such deed, it was a cover for Johnson against his creditors, and it is not pretended that Johnson was ever dispossessed in consequence of it.

The only important expressions as to his intention are after the sheriff's sales, and before the transaction with the appellant. I have already said, that if they expressed the clearest intention, he had a right to alter it, for the purpose of effecting this transaction. They do not, however—they only express the simple fact, that he had the control of both interests, and could do what he pleased, that is, whatever his intention might lead him to do, with the property. What

that should be was not determined till he came to actual dealing about one or both of the interests. This first occurred with the appellant. Do not his acts here sufficiently show his intention to keep them separate, to raise more than he could by letting the equity of redemption sink and making a new mortgage of only three-fourths of the whole? The Chancellor in discussing this question of the extinguishment of the equity of redemption says, "it is preserved only when the intention of the party is distinctly declared at the time."^(v) What time? "Or where something just and beneficial requires the charge to be preserved."^(w) Now can any thing be more just or beneficial than to prevent the commission of fraud? The Chancellor looking only at one side of the question, and therefore looking only at one fraud, says,^(x) "I believe there is no instance to be found, in which the charge has ever been kept on foot by the Court, when third persons have been invited to deal with the party on the legal presumption of merger, and when a fraud would be committed if the merger was not permitted to operate according to the principles of law." May not this be turned, *where a fraud would be committed if the union were held to have taken place*. Again he says,^(y) the doctrine of *Forbes v. Moffatt*, is, "that a person entitled to an estate subject to a charge for his own benefit, may, *if he choose*, take the estate and keep up the charge." If he *can* do so, should not he be *forced* to do so, where doing otherwise would be to practice a fraud? and in the same way, would not doing an act which would otherwise be a fraud on a third person, *be doing something by him to keep the charge on foot?*

At this time, no one but Wattles, and the appellant had any interest in the matter. The very assignment for value, therefore, fixed the rights of both. *After that, no transaction between Morey and Wattles could alter or impair the appellant's rights*. And I cannot but think (when Wattles gave that much, and no more, and when it is confessed that the respondent knew of the appellant's claim to its full amount, without any suspicion of its invalidity,) that Wattles only intended to convey to the respondent an interest as

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^(v) 6 John. Ch
Rep. 423.
^(w) Id.

^(x) Id. 424

^(y) Id.

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second mortgagee in the equity of redemption ; and that Morey did not contemplate deriving his own security out of more.

But if the deed could not be supposed to assign the old mortgage ; as it certainly conveys to the appellant (which I shall now assume) the legal estate, and subjects it to a condition of redemption, on payment of a certain sum of money, the payment of the full consideration, will make it operate *in some way*, to the appellant's benefit. Could Wattles contend that such a deed, on full consideration, was a mere nullity ? As to him, and those deriving under him, therefore, if it cannot operate more favorably for the appellant, it must be regarded *as a new mortgage*. That certainly was not the thing contemplated by the parties, and there were no laches in not recording it as such. But suppose that law applicable to it ; Morey neither registered his deed nor defeasance, and the case would come entirely within that of *Berry v. Mutual Insurance Company*.^(z) I must refer to, and rely on the reasoning in the report of that case. If that be law, our first mortgage has then the preference, and must be first satisfied.

^(z) 2 John
Ch. Rep. 612.

^(a) 16 John.
149.
^(b) 5 John.
Ch. Rep 320.

But, *secondly* ; setting the assignment of the mortgage aside, he undoubtedly knew of the judgment docketed 12th Nov. 1818. Whether he knew of it or not, if the specification be good, it binds the property. The decision in *Lawless v Hackett*,^(a) goes beyond the statute, and is unsound. The Chancellor's decision in *Brinkerhoff v. Marvin*,^(b) was clearly made only in conformity to that of the Supreme Court. The consequences of that decision were the repeal of the law itself.

But, *thirdly*. If the specification be not good, that does not make the judgment void and a nullity, as is alleged. Supposing a mortgagee to be a purchaser within the meaning of the act, yet he must also be *bona fide*, and for valuable consideration. These two expressions are not synonymous ; for then the law would have simply said, " purchasers for a valuable consideration ;" but in addition to their being purchasers for a valuable consideration, they must be *bona fide* purchasers. That expression cannot apply as be-

tween seller and purchaser, for there the payment of the valuable consideration operates every thing. The expression *bona fide* must relate to the good faith and honesty of the transaction with regard to the rights or interests of third persons, who have antecedent claims; the first and most conspicuous of whom is the judgment creditor. The law does away the obligation of the purchaser to know and be bound by the judgment, merely because docketed. It does away the effect of that notice, but it preserves the effect of *actual knowledge*, by force of the words *bona fide*. The doctrine is quite false, that a man might say to the judgment creditor, "I know you have a judgment, but your specification is defective, and I will buy." Suppose a man who saw the inventory and valuation made, saw the goods sold, was present at the bargain, and saw the bond and warrant given for them, and the judgment entered up: would it be tolerated that he, finding some fault in the specification, should buy the land he knew was intended to be covered by the judgment, and then claim to be a *bona fide purchaser*? (c)

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3. But the equities being equal, it is also a serious point to consider, who has the legal estate? for then *cæteris paribus*, a Court would not take the legal estate away from the person having it. The respondent's counsel, regardless of the priority of our transaction, and assuming the monstrous position, that as between Wattles and us, the deed for which a consideration of \$9000 was given, *passed nothing*, though Wattles had then a right to pass every thing, have taken for granted that Wattles' deed to Morey gave him the legal estate. But it certainly did not; for Wattles had not then the legal estate in himself to pass over. He had parted with it to the appellant, and whatever trust (if any) the appellant can be affected with, he has still the legal estate. Morey has, indeed, acquired the possession—how? but *as a mere tenant*. Wattles and Johnson were in possession; and from the nature of a mortgage, were in as tenants to James, the interest being the equivalent of the rent. In Nov. 1818, the partnership of D. Morey & Co. commenced, and by agreement, Morey, in the beginning of 1819,

(c) *Dunham*
v. *Dey*, 15
John. 555.

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(d) This result was agreed to by respondents' counsel, vid. ante, 265.

went into possession of the property, and shortly after Johnson moved off. Morey paid rent from the beginning, nor did his deed of 14th June, 1819, alter his situation. He continued a *tenant still*, paying rent, and has charged himself with it in his accounts to their close, down to 16th Sept. 1820; and even if he should be allowed to hold the property, he must pay rent for it to the time of selling it under the decree(d) (which the Chancellor has omitted to direct.) He must, therefore, be considered as in by sub-tenancy under the appellant. His possession, which accrued before the 14th June, 1819, and always continued by paying rent, is the appellant's possession, and he cannot now be permitted to turn that into an adverse possession, destructive of the appellant's rights, which, in truth, it enured to fortify. That he cannot be permitted to hold against the appellant; and the question recurs, who has the legal estate?

This point can admit of no dispute, unless the idea can be tolerated that, as between Wattles and the appellant, the deed of the 9th Nov. 1818, for a valuable consideration, passed nothing! This the respondent's counsel contend for, without distinctly avowing it; but they say it does not transfer the mortgage—it does not make a new mortgage—it does not convey the legal estate, discharged of any equity of redemption. What, then, did it do on the 10th Nov. 1818, and who, on that day, had the legal estate? It is said not to pass the absolute estate, free of equities, on account of the recital and the *habendum*. We never contended it did; but only said, that was a consequence of their doctrine, that the equity of redemption was inseparably united to the legal estate; which, if true, would make the *habendum* inoperative. Our bill was filed on the principle, that the equity of redemption continued; and we admit the *habendum* is evidence of that fact; but the *habendum* does not purport to enlarge, diminish or alter the legal estate from what is given in the premises;(e) and still less to do the absurd act of taking it entirely away, which would make the *habendum* itself void. What, then, in a deed for a valuable consideration, sufficient to make valid a bargain and sale, and for a further consideration, set forth in the recital, of securing \$9331, is the effect of the words,

(e) Vid. post, of opinion of Woodworth, J.

"grant, bargain, sell, &c.?"(f) But they say the limitation in the *habendum* is "as fully as I might hold and enjoy the same by virtue of the mortgage deed within."(g) Independent of the fact, that he had an election to keep up the mortgage, the whole of his own legal estate was derived from, and enjoyed under that very deed of mortgage. He had the legal estate against Johnson before the Sheriff's sale. That passed nothing to him or Sabin, but the equity of redemption. After Sabin purchased Johnson's right, title and interest, who had the legal estate in that very lot he bought? Wattles. Under what did he enjoy it? Could Sabin have resisted an ejectment brought by Wattles? Test the legal estate by seeing who could bring ejectments. If Johnson had obstinately remained in, and James, from non-payment of interest, had determined to put him out, who should be the lessor of the plaintiff? If Wattles were, could not Johnson nonsuit him by the production of the assignment? If the appellant were the lessor of the plaintiff, could he be nonsuited because the legal estate still continued in Wattles? Could not the appellant have ejected Sabin? If the appellant had gone into possession, could either Johnson, or Wattles, or Sabin, have ejected him? Clearly, up to the 14th June, 1819, as against all the world, the appellant had the legal estate. If so, how could the deed to the respondent from Wattles, on that day, affect his legal estate? Wattles had it not to pass, and therefore did not pass it. If the appellant had brought ejectment against Morey, showing his deed, and that Morey came in as a tenant, and paid rent for the enjoyment of the premises, to Wattles, whom the law would regard as the appellant's tenant, could he nonsuit the appellant? On the other hand, if the appellant had got into the possession, could Morey eject him? All these positions show that the appellant has, and Morey never had, and could not have, the legal estate.

But it may be said, why not leave us to our remedy, at law? That, at least, the Court must do for us, if they cannot do better. But to do that, they must reverse this decree; for how can we be left to our legal remedies, when the decree directs the estate to be sold, and, of course, our legal

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(f) Id.
(g) Id.

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rights to be barred. That objection, however, does not prevail against the Court's selling for our benefit, under our mortgage, as in every case of a mortgagee's filing a foreclosure bill, he necessarily has the legal estate, which he might, as such, enforce at law ; but he comes into Equity to have the property so sold as to extinguish every claim to redeem in favor of the purchaser under the decree, and that, is the proper course wherever any one claims the benefit of a trust or equity, which, on payment of the money secured by the legal estate, the owner is desirous of having extinguished.

4. But supposing it possible to decide all the previous points against us, it still remains to inquire, whether all the objects for which the mortgage was made to the respondent and for which he may be entitled to a preference over the appellant, have not been so far accomplished as that he can no longer interpose any impediment to the appellant's enforcing his remedy ?

The objects for which the mortgage of this property to the respondent, and the assignment of Wattles' interest in the partnership stock were made, are set forth by the respondent, in his answer. They are the Auburn note and the Wattles and Granger debts. The respondent nowhere avers that there was even any parol agreement between him and Wattles, that these securities should extend to any other debts or transactions. He insists on no such thing in his answer, but simply says that he holds possession under and by virtue of his deed, as a security for the balance due him from Wattles. That must be referred to the balance due under the only agreement he has stated, or that any witness has pretended to state, to wit, to secure for the note and the Wattles and Granger debts. If he had a preference under his mortgage, and any such balance were due, his right of retaining *pro tanto*, might be insisted on. But it will not be contended that the partnership property assigned was not fully adequate to pay them. And if the respondent did not claim to hold against the appellant for other purposes, there would now be no room for controversy. As he never bargained for it, if he cannot do so, he has lost nothing, on the faith of which he ever gave any credit ; and if he can do it, he deprives the ap-

pellant of a security for which he unquestionably agreed and paid. The Chancellor has supported his right to do so, on the ground of a parol agreement between Wattles and him, to sell the property, (in which, observe, the appellant's lien was always kept in view, and its discharge made an essential stipulation,) and that was in a great degree performed by the respondent. Now suppose *that* the fact still, how can it affect the vested rights of the appellant. His judgment was perfected the 21st August, 1819; and although it might not reach the interest acquired on the antecedent 14th June, that is, to secure the note and the Wattles and Grauger debts, yet it would undoubtedly be a prior lien on any interest he might acquire by the subsequent agreement to purchase, which only took place in Dec. 1819. How is it possible that the breaking off that agreement can justify the respondent's retaining, for simple contract debts of Wattles, contracted after the appellant's judgment had become perfect, and a lien on the property? Besides, whatever the respondent may have done under that partial agreement, it is clear he abandoned, and wanted to get rid of it. Yet the Chancellor goes on and says, "he was dealing," &c., "without any notice of the assignment, or that any claim was still existing under it;" but he certainly knew of the judgment, which, on the antecedent 21st August, was made an unquestionable lien on the property; and can he have priority to the lien of this judgment? Even where the mortgagee may tack a subsequent debt against the mortgagor, his heir or beneficial devisee, he cannot do it against creditors, or trustees for creditors, or other persons entitled for a valuable consideration.^(h)

The Chancellor goes on laying down, but not applying the doctrine correctly, that it may be unobjectionable, "if no intervening right exist to prevent the application of the rule;" but he does not seem to advert that a judgment perfected on the 21st August was such an intervening right; and, in the same way, totally forgetful of that judgment, he goes on and says, "here the plaintiff, under the circumstances, has no right to complain, considering what kind of security he took, and from whom, and that notice of the as-

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(h) *Lowthian*
v. Hassel, 3
Br. C. C. 162.
Coleman v
Witch, 1 P
Wms. 775
Hamerton v
Rogers, 1 Ves.
jun. 513.

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(i) Vid. last
paragraph but
two of Judge
Woodworth's
opinion, post.

signment was not given until long after the accounts were closed." Suppose, all that true and pertinent, why is our judgment, made perfect on the 21st Aug. 1819, disregarded or overlooked ?(i)

But even if any of those simple contract debts could afford ground for retaining possession, what would they be? Certainly not those contracted *before* the 14th June, 1819, for they would have been specified, as well as the Auburn bank note and W. and G's. debts, if it had been the intention of the parties; and as the parties, at the time, excluded them, it is impossible to include them now.

Neither can any simple contract debts, after our judgment was perfected on the 21st August, 1819, gain a preference over its lien, either with or without any agreement to which the appellant was not a party. Then it could be only those in the intermediate space between 19th June and 21st August, 1819.

The facts
stated.

WOODWORTH, J. On the 17th June, 1817, Caleb Johnson gave a mortgage to James O. Wattles, to secure the payment of \$12,000. On the 2d August, 1817, a judgment was docketed in favor of Wattles against Johnson for \$2000. Executions issued on this, and three other judgments, (all subsequent to the mortgage,) and on the 20th April, 1818, the mortgaged premises were sold in separate parcels. William H. Sabin purchased the first parcel for \$205, which, at the time of sale, was worth \$2000. Wattles purchased the residue at \$440.

The value of the mortgaged premises appears to have been somewhere between \$6000 and \$10,000. Deeds were executed by the Sheriff to the purchasers.

Reuben West testified, that before the close of the sale, he heard Wattles publicly say, he had a mortgage on the property, executed by Johnson.

Several other witnesses testify, that they were present, and heard no claim set up under the mortgage. It is in proof, that before the sale, Wattles at different times, stated that Johnson had given a quit claim deed of the premises. This evidence, however, is insufficient to establish a release :

it was so considered by the Chancellor, and was not pressed on the argument. After the sale, Wattles repeatedly declared he had purchased the equity of redemption, and that his title to the property was then complete. Notwithstanding these declarations, it is very evident he did not consider the mortgage extinguished. Nicholas P. Randal testified, that after the sale he asked Wattles, why he let Sabin bid off the property for so small a sum? he answered that Sabin would be glad to give it up, as he had enough upon it to induce him to do so. Randal believes that the mortgage was mentioned as the incumbrance on the property. Whatever may have been the opinion of Wattles as to the then state of his title, it is apparent he did not consider the mortgage a mere *caput mortuum*, but a valid security.

On the 9th Nov. 1818, Wattles for the consideration of \$9331 assigned the bond and mortgage of Johnson to the appellant, and covenanted that there was due \$12,000. On the same day, for the purpose of giving additional security, he executed a bond and warrant of attorney to confess a judgment, which was docketed on the 12th Nov. 1818. On the 21st August, 1819, an amended specification was filed. On the 26th May, 1818, Sabin assigned all his right and title in the mortgaged premises to Wattles. On the 14th June, 1819, Wattles quit claimed the premises to the respondent, for the alleged consideration of \$10,000. The deed though absolute in its terms, was given to secure the respondent against a note of \$5000, and a bond of indemnity executed to Amos P. Granger. As additional security, Wattles made an assignment, dated June 14th, 1819, of his share of the partnership goods and effects in the firm of D. Morey & Co., and also all the personal property belonging to him, then at their distillery, ashery, store and shop in Onondaga. Under this assignment the respondent became entitled to, and actually received a large amount of merchandize, with other articles, which constituted a fund, to be applied to the particular objects specified in the assignment. What the result would be on an account taken, cannot at present be particularly ascertained, nor is it material to inquire, if the appel-

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The appellant
was a fair pur-
chaser of the
bond and
mortgage.

Whether pur-
chase by mort-
gagee, of equi-
ty of redemp-
tion, merges
equitable, in
legal estate.
General rule.

Semb. Where
part of legal
and equitable
estate unite,
the latter may
be merged *pro*
tanto.

Whether the
doctrine of
merger ap-
plies.

Mergers never
favored by
law; still less
in equity.

lant is entitled to hold the mortgaged premises to satisfy his claims.

The appellant appears to be a fair purchaser of the bond and mortgage; John Meeker was justly indebted to him in \$9331, for goods sold; Wattles assumed the debt, and Meeker was discharged. As a consideration for this responsibility, Wattles received from Meeker a large amount in goods, which afterwards passed to the firm of Morey & Co. The bond and mortgage were taken in the regular and ordinary course of business. Nothing like unfairness is discoverable, and the appellant dealt with the mortgagee on equal terms. The assignment was not a suspicious instrument, as his honor the Chancellor seems to consider it. Such a conclusion casts a shade over the transaction, at variance with its real character.

The most important question is, whether the purchase of the equity of redemption, by uniting the equitable and legal estate, created a merger, and thereby prevented the mortgagee from setting up the mortgage as a subsisting security.

The rule is, that wherever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated, or in the law phrase, is said to be merged, that is, sunk or drowned in the greater. (2 Black. Com. 177. 3 Lev. 437. 2 Rep. 60, 61.)

I have not met with any case where the question of merger was raised, on the union of part of the equitable and legal interest; yet do not perceive any valid objection to allow it *pro tanto*.

The inquiry now is, does the doctrine of merger apply? In *Jackson v. Hull*, (10 John. 481,) the mortgagee obtained judgment, and on execution, the equity of redemption was sold to a purchaser for less than the debt. In an ejectment by the mortgagee, to recover the premises, the Court considered, that the sale was only of the *residuum* of interest, remaining in the mortgagor, after the execution of his mortgage, and that the mortgagee was entitled to recover.

In Co. Lit. 338 b. it is said, "mergers were never favored in Courts of law, and still less in Courts of Equity."

They are never allowed, unless for special reasons, and then only to preserve the intention of the parties. (15 Vin. 362, (A. 5.) *Phillips v. Phillips*, (1 P. Wms. 41.)

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Where there is a union of rights, equity will preserve them distinct, if the intention so to do, is either express or implied. (4 Brown, C. C. 403.) The distinction stated by Lord Hardwicke is, that when the owner of the fee, in which the charge would otherwise merge, manifests his intent that the charge should subsist, his intent, if clear, shall prevail. (*Chester v. Willis*, Ambler, 246. 2 Fonbl. 169, n. a.) In *Compton v. Orenden*, (2 Ves. Jun. 264,) Lord Thurlow observes, "it is a clear principle, both at law and in equity, that where there is a confusion of rights, where debtor and creditor become the same person, there is an immediate merger, but that equity will preserve the rights distinct, according to the intent express or implied. Wherever it is more beneficial for the person entitled to the charge to let the estate stand with the incumbrance upon it, than to take it discharged of the incumbrance, that circumstance will have a controlling influence in deciding on the implied intent." The argument on both sides seems to have proceeded in accordance with these principles; the respondent contending that Wattles had uniformly manifested his intention to consider the mortgage merged, by declaring himself the absolute owner of the premises purchased at the Sheriff's sale.

Equity keeps
rights distinct
where inten-
tion is to keep
them so.

Where keep-
ing rights dis-
tinct is benefi-
cial to owner,
this will in-
fluence in de-
ciding on in-
tent.

The offer of Wattles to sell as absolute owner, and his declarations prior to the assignment of the mortgage to the appellant, are supposed by the respondent's counsel to be decisive on this question; but I apprehend they ought not to be viewed in that light. Whatever opinion Wattles may have formed on the question of law under discussion, it is perfectly clear he did not consider his mortgage extinguished, for immediately after the sale he speaks of the mortgage, as the incumbrance relied on to induce Sabin to give up his purchase. He may have declared that he was the owner, but in making out his right to that character, he evidently did not lose sight of an existing mortgage, and considered it as forming a part of his title. Whether he had correct legal notions on this question is perfectly immaterial; the point is, did he

Wattles did
not consider
his mortgage
extinguished.
His conduct
and declara-
tions on this
head.

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Had he conveyed in fee, this would have extinguished mortgage.

Other facts irreconcilable with idea of merger.

If mortgage extinguished by merger, bond cannot be set up.

declare or intend to declare that the mortgage was extinguished? If he did not, the proof is defective. His view of ownership, we must understand, as consistent with a valid incumbrance by way of mortgage. His declarations were substantially correct, at least, so far as any purchaser could have an interest; and, admitting the mortgage was not merged, yet Wattles, having an election to treat it in that manner, might well offer to convey a good title; for the moment he executed a conveyance of the fee simple of the estate, then his election having been carried into effect, the purchaser would acquire a good title, and the mortgage be extinguished. No fraud would be committed; for, until Wattles acted, his declarations were indifferent. Until there was some person in interest, no one had a right to complain, whether he represented himself as owner, or rested on the mortgage as a valid security. Whatever Wattles may have said, one fact of decisive importance is conceded—no individual obtained any interest or claim upon the premises, from the 20th April, 1818, when the sale took place, until the 9th November following, when the assignment to the appellant was made.

But there are other facts in this cause, which, on the supposition that Wattles was of sane mind, are irreconcilable with the idea of merger. That portion of the premises bought by Sabin was worth, unincumbered, \$2000; it was bid off for \$205. Would the mortgagee stand by and permit this purchase, if resort could not be had to his mortgage? Could he have so intended? Certainly not. When he purchased the residue himself, did he intend that the mortgage should merge thus far, and take his chance of establishing its validity as to the portion purchased by Sabin? I apprehend not. His security and interest concurred, in suffering the charge to remain. Besides, it is in proof that the mortgaged premises were not equal in value to the amount due.

If the mortgage is extinguished, on the principle of merger, it can no more be set up, than if it had been fully paid. What, then, becomes of the bond? If the mortgage is satisfied, it is declared that the bond, given as collateral security, shall also be void. Could Wattles have intended

to abandon all claim to the residue? and if not, did he against his interest, intend that a merger should take place and unnecessarily risk the issue of the question, whether Johnson was any longer holden on the bond?

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Difficulty as
to balance.

But if Johnson was not exonerated, what is to be the measure of recovery? How is it to be ascertained? If entitled to relief when prosecuted on the bond, it must be by drawing the mortgagee into an expensive litigation in Chancery, in order to ascertain the extent of his liability, and how much shall be credited to him from the face of the bond?

But the conclusive answer to the argument, derived from the declaration of Wattles, that he was the absolute owner, is this: until he made a disposition of the property, and until some person acquired an interest, he was at perfect liberty to consider the mortgage merged or not, as might be most beneficial. If the question is to be decided by intent, express or implied, when does it become fixed and unchangeable? Certainly not until some one acquires an interest, and thereby obtains a right to draw it in question. It would be novel in principle, and I apprehend without precedent in any book of authority, that a stranger should urge, "you once declared the mortgage was merged, and, although, at the time, it was indifferent to all the world in what manner you treated it, you are bound by that election."

Till 3d person
had interest,
W. might con-
sider mort-
gage merged,
or not.

Intent did not
become fixed
till this;

It does not appear that Wattles had done any act previous to the 9th Nov. 1818, which prevented his setting up the mortgage as a charge on the land. On that day he made his election, acted under it, and for a *bona fide* consideration, assigned to the appellant. The intention not to consider the mortgage merged, then and not before, became fixed. At this time there was no conflicting claim.

Which was
Nov. 9, 1818,
and not before,
by assignment
to appellant.

There is no principle of law or equity with which I am acquainted, that can, on the present state of facts, rightfully deprive the appellant of the security thus taken. Whatever question there might be as to Wattles' intent previously, none could exist after this transfer.

Appellant
cannot be de-
prived of his
security.

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Whether ap-
pellant bound
to record as-
signment.

Premises not
within the mi-
litary tract.

Assignment
not within re-
gistry acts;

And would not
have been no-
tice if record-
ed.

Assignee takes
subject to ac-
count.

Payments af-
ter assign-
ment, without
notice, allow-
ed.

Not neces-
sary to give
notice of as-
signment to
purchaser.

But it is contended, that the appellant was bound to record the assignment, in order to protect himself against a subsequent transfer by Wattles. The received opinion has been, that (except in certain counties) an assignment need not be recorded.

The premises in question do not lie in what is termed the military tract, and consequently are not governed by the act, requiring all deeds and conveyances of or concerning, or whereby any of the military bounty lands may be affected in law or equity, to be recorded.

The act of March 23, 1821, first directed the recording of deeds, conveyances or writings concerning lands in the towns of Onondaga and Salina, where the premises are situated. The act concerning mortgages, (1 R. L. 372,) prescribes the manner in which the mortgage shall be registered, but does not extend to the case of an assignment; it was therefore optional with the appellant to record or not. The omission cannot be urged as a ground to postpone his security.

If the assignment had been recorded, it would not have been noticed, for the plain reason, that recording was not required by law. The principle is well settled, that when an assignment of a mortgage takes place, without the privity of the mortgagor, the assignee takes subject to the account between the mortgagor and the mortgagee, *Mathews v. Wallwyn*, 4 Ves. Jun. 118,) and that payments to the mortgagee, after assignment, without notice, must be allowed by the assignee. (*Williams v. Sorrell*, 2 Ves. Jun. 389.) I apprehend this is all the risk the assignee incurs. I have not met with any case that places the rights of the assignee on other or different ground, or that gives countenance to the suggestion, that the assignee must, at his peril, give notice to a subsequent assignee, or purchaser from the mortgagee. Such a doctrine is not only most unreasonable in itself, but would shake the foundation of security by mortgage assignment, hitherto deemed equal to that of the original mortgage, with the exceptions I have stated. It would, in fact, be no security, beyond the responsibility of the person making the assignment; for the assignee has no

means of ascertaining how often, and to whom, the mortgagee may have subsequently assigned. Such notice is not necessary for the protection of a subsequent purchaser. The registry of the original mortgage is notice to him of its existence. If he will deal without asking for the mortgage or requiring it to be cancelled, he comes, without a semblance of equity, to demand that the prior *bona fide* assignee shall be postponed to his claim. Where the mortgagee makes a second assignment, the assignee knows that a prior assignment may have been made, and consequently must, as to that fact, repose on the responsibility and integrity of his assignor. If he should be deceived, it is more equitable that he should suffer, than to divest the right of the first assignee, who had acquired the legal estate.

But is this pretended hardship any thing more than every purchaser of land was liable to, since the existence of this government, until the last acts requiring deeds to be recorded? Every grantor had the power of conveying a second time, and no doubt the power was sometimes exercised by fraudulent individuals. It was never seriously urged that the second purchaser had any remedy against the first purchaser, because his deed was not recorded or notice given.

The conveyance by Sabin to Wattles, on the 26th May, 1819, does not change the rights of the appellant. There being no merger as to any part of the mortgaged premises, the mortgage stands valid, and is not affected by any of the subsequent transfers.

But it is contended by the appellant, that independent of the assignment, he gained a priority, in consequence of the judgment docketed against Wattles, Nov. 12, 1818. The act of April 21st, 1818, required the filing of a particular statement and specification of the nature and consideration of the debt or demand. If omitted, the judgment shall be adjudged fraudulent, as respects other *bona fide* judgment creditors, and every *bona fide* purchaser for valuable consideration. According to *Lawless v. Hacket*, (16 John. 149,) the first specification did not comply with the act. I am not inclined, at this day, to unsettle that rule. It has been acted upon and recognized in the Supreme Court, and in Chancery, as giving the true construction of the statute. No doubt valu-

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Moroy

No merger.
Mortgage not
affected by
subsequent
transfers.

Whether
judgment gave
priority.

Specification
insufficient.

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Morey.

And cannot
avail, if re-
spondent is a
bona fide pur-
chaser.

Mortgagee a
purchaser
within 27 Eliz.

Term pur-
chase compre-
hends every
acquisition ex-
cept by de-
scent.
Its meaning in
equity.

Mortgagees
may be consid-
ered purcha-
sers.

And it follows
that notice of
judgment can-
not prejudice
respondents.

It is not like a
prior mort-
gage,

where registry
is required for
purpose of no-
tice.

able estates have been acquired and are now held under it, though if it were *res integra*, it might be questionable whether the statute required so minute a specification. The judgment, then, under the first specification, cannot avail, if the respondent be considered a *bona fide* purchaser for valuable consideration, within the meaning of the act.

It is held, in England, under the statute 27 Eliz. respecting conveyances made to defraud purchasers, that a mortgagee is a purchaser, within the act, although the statute speaks only of estates of inheritance for life or years, (3 Cruise, 378, tit. 32, ch. 22, sec. 38, 49. *Chapman v. Emery*, Cowp. 280.)

The term purchase, is of very extensive signification, and comprehends every species of acquisition in contradistinction to hereditary descent and escheat. (Co. Lit. sec. 12.) In Equity a purchaser is considered as a person, who without fraud, and for valuable consideration, acquires a right or interest, and is, therefore, so far favored, that his title shall not be impeached in Equity. (1 Eq. Ca. ab. 353, A, and the cases there cited.) I think the terms of the act may be satisfied by including mortgagees within the word purchasers. Although the popular understanding is, a purchaser in fee, the reason and spirit of the act protect the mortgagees, as well as subsequent judgment creditors. The former are equally within the mischief intended to be remedied.

This being the construction of the act, it seems to follow, that notice of such a judgment cannot prejudice the respondent's rights; for it is only notice of a judgment declared by the act to be fraudulent, and consequently not obligatory on the respondent.

But it is contended that the respondent did not purchase *bona fide*, because he had notice of the appellant's judgment, and the case of *Dunham v. Dey*, (15 John. 568,) is supposed to support this doctrine. There is, however, a manifest distinction. In that case, it was decided that a person who takes a conveyance of land, with notice of a prior unregistered mortgage, is not a *bona fide* purchaser, who can gain a priority by having his deed first recorded. Now the unregistered mortgage was a valid security. It had every essen-

ral as a just demand between the parties. It could only be defeated by an omission to register, if a purchaser intervened. But notice, in such a case, supersedes registry. The object intended by the statute, which is to apprise the purchaser, is attained. The unregistered mortgage is not declared fraudulent, but shall be postponed.

The statute relating to specifications had other objects in view. Numerous frauds had been committed by entry of judgments on bonds and warrants for fictitious demands. To detect the fraud was a principal object, by requiring a minute statement, which would enable the purchaser, or subsequent judgment creditor, to unravel the fraud. If this was not filed, it was then adjudged fraudulent. The creditor might disregard it. He had a right to consider it fraudulent. If notice of such a judgment is a substitute, the statute is a nullity. Apply the doctrine to a subsequent *bona fide* judgment creditor. He has notice of the first judgment, but the other essential is wanting—a good specification. The judgment, then, cannot strengthen the appellant's claim. He must rest on his assignment, which, in the view I have taken, is amply sufficient.

It has been contended, that if the appellant took nothing as assignee of the mortgage, by reason of the merger, then he is entitled to the premises, under the words granting the same to him, his heirs and assigns forever. This ground, I think, would be tenable, if the granting words were not restricted in their operation; but the *habendum* is, "to hold the same as fully as the mortgagee might hold and enjoy the same by virtue of the mortgage and bond accompanying the same." These expressions unequivocally show that no right or title was granted, but such as might be acquired by the assignment of a subsisting mortgage.

If it be admitted that the respondent is entitled to the prior lien, then I am of opinion the decree is erroneous, in allowing the respondent to be satisfied out of the mortgaged premises, to the whole extent of the balance due him. His conveyance was solely a security for a note of \$5000, and a bond executed with Wattles to Amos P. Granger.

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where actual
notice super-
sedes registry.
Specification
required for
other objects.

And unless
filed judgment
may be disre-
garded.

Whether as-
signment e-
nures as a
grant.

Habendum.

If respondent
has preference,
decree errone-
ous in allowing
general bal-
ance

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It does not
appear that
Wattles ever
assented to
this;

Or that ad-
vances were
made on cre-
dit of assign-
ment.

Mortgage to
secure future
advances good.

Pledge may
be security for
farther loans;
as if this be
agreed.

Mortgagee
cannot tack a-
gainst mortga-
gor, nor credi-
tors but may
against heir.

Not in any
other case.

The first objection to this allowance is, it no where appears that Wattles ever assented that the mortgage should secure any thing beyond the specific objects for which it was given. The assignment of the partnership goods to the respondent was subsequently taken as a collateral security. There is no proof that advances were made on the credit of the original security. A mortgage made to secure against future as well as present responsibilities is undoubtedly good. In some cases, a subject pledged for a debt may be considered as a security for further loans. The cases referred to by his honor the Chancellor, in *Hendricks v. Robinson*, (2 John. Ch. Rep. 309,) do not support the right claimed by the respondent. In *Shirras v. Craig*, (7 Cranch, 34,) the mortgage was executed, in part, to secure the payment of money actually due at the time, and in part to secure sums *to be advanced*. So, in *The United States v. Hooe*, (3 Cranch, 73,) the mortgage was to secure against existing and future responsibilities. The attempt here is, without any understanding or agreement, to hold the mortgaged premises charged for a general balance. It is highly probable, from the testimony, that on an account taken, (after first applying partnership property to the payment of partnership debts,) a sufficient sum will remain out of the merchandize and other articles assigned as a collateral security with the mortgage, to pay off and discharge the note of \$5000, and the responsibility incurred by the bond to Granger.

The rule laid down in *Jones v. Smith*, (2 Ves. Jun. 376,) is, that a mortgagee cannot tack a bond against the mortgagor, nor against creditors, but may against the heir, to prevent circuitry of action. But if the heir assign the equity of redemption, the assignee who brings his bill to redeem, shall pay the mortgage only, and not the bond. (1 P. Wms. 776.) In *Lowthian v. Hasel*, (3 Brown's Ch. Rep. 162,) it was held that a mortgagee, having also a bond, cannot tack it against other specialty creditors, tho' he may against the heir. Lord Tharlow observes, in natural justice the right has no foundation; the creditor having another special security, cannot give him, in justice, any priority; it has not been done in any case, but that of the heir, and merely to prevent circuitry."

So in *Hamerton v. Rogers*, (Ves. Jun. 513,) a bill of foreclosure was dismissed with costs, so far as it sought to tack a bond to a mortgage against creditors. To these may be added the case of *ex parte Hooper*, (1 Mer. 7,) where a mortgage was held no security for subsequent advances made on the strength of a parol engagement.

These cases conclusively show that the respondent cannot divert the securities taken from the objects specified, when it formed no part of the original agreement, nor was ever assented to subsequently by Wattles, and particularly when an objection is interposed by a *bona fide* creditor holding a judgment made valid by an amended specification.

But even admitting that the respondent may apply the fund to satisfy advances not contemplated when the mortgage was given, the doctrine will not allow such application after the 21st August, 1819, when the amended specification was filed, from which time the judgment became operative, against subsequent judgment creditors and purchasers, and became a lien on the mortgaged premises. If the respondent is allowed for advances between the 14th June, and 21st August, 1819, I apprehend the allowance must stop there. The appellant's right then became perfect, to require that the fund remaining be exclusively applied to discharge the note and bond of indemnity. After that day the respondent had no power to disregard the appellant's judgment. This point is not noticed by the Chancellor. As its correctness cannot, I think, be well questioned, I presume it was overlooked; otherwise it would probably have produced a modification of the decree.

My conclusion, then, is, that the appellant is entitled to hold the mortgaged premises under the assignment for the demand therein specified, on the ground, that there was no merger, and consequently that the mortgage was a valid security. But secondly, if it were otherwise, then I am of opinion that all the property received by the respondent, under the assignment made by Wattles, subsequent to the mortgage, be applied, if necessary, in discharge of the note of \$5000, and the bond of indemnity, after first satisfying

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Mortgage
no security for
subsequent
advances
made on pa-
rol engage-
ment.

Respondent
cannot divert
securities from
original ob-
jects.

Or if he
could, they
cannot extend
to advances
made after
21st August.
1819.

Recapitula-
tion.

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partnership debts due on the 14th June, 1819; and that the mortgaged premises be holden by the respondent as charged with the balance only, if any, after making such appropriation; it being the clear intention of the parties, that the fund should, in the first instance, be exclusively applied in this manner. If, however, it be decided that the securities cover subsequent advances, they ought only to include such as were made between the 14th June and 21st August, 1819, when the appellant's judgment becoming effectual, interposed a legal and equitable barrier against a further allowance.

I am of opinion that the decree of his Honor the Chancellor be reversed.

Question is
whether mort-
gage, when as-
signed, was
subsisting.

SUTHERLAND, J. The great question in this case is, whether the mortgage given by Caleb Johnson to James O. Wattles, on the 24th day of June, 1817, and which was assigned by Wattles to William James, the appellant, on the 9th day of November, 1818, was, at the time of such assignment, an unsatisfied and subsisting mortgage. For, although many other topics are presented by the case, and were elaborately and ably discussed by the learned counsel who argued it, a diligent examination has satisfied me, that the question of merger must control the decision of this Court.

Statement
of facts.

The facts out of which this question arises are briefly these:—One Caleb Johnson, being indebted to James O. Wattles, in the sum of \$12,000, for the purpose of securing that sum executed to him, on the 24th June, 1817, a bond together with a mortgage on certain lots and buildings in the village of Onondaga. The mortgage was duly registered on the 17th day of July thereafter. On the 20th day of April, 1818, all the right and title of Caleb Johnson to the mortgaged premises were sold by the Sheriff of Onondaga, under several executions upon judgments against Johnson, obtained in the Onondaga Common Pleas. The premises were sold in two parcels. The first under a judgment in favor of Wattles for \$2000—of which William H. Sabin became the purchaser, for the sum of \$205: The residue, under four other judgments in favor of different persons, of which residue James O. Wattles became the purchaser for the sum of \$440. Conveyances

were, on the same day, executed by the Sheriff to Sabin & Wattles, for the parcels thus purchased by them respectively. All the judgments were subsequent to the mortgage. Nothing passed, therefore, by the sale and conveyances of the Sheriff, but Johnson's equity of redemption in the mortgaged premises.

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Wattles being thus the owner of a mortgage on the whole of the premises, and of the equity of redemption in a portion of them, became indebted to William James, the appellant, in the sum of \$9331; and for the purpose of affording to him additional *collateral security*, on the 9th day of November, 1818, assigned to him the bond and mortgage in question, covenanting in the assignment, that the sum of \$12,000 remained due. On the 26th day of May, 1819, Sabin conveyed to Wattles all his estate and interest in the mortgaged premises; and on the 21st day of July thereafter, Wattles conveyed the whole of the premises to the respondent, Davenport Morey, by way of security against certain responsibilities incurred by Morey for him. The deed bore date on the 14th June, 1819, and though absolute in terms, is admitted to have been given by way of security or mortgage only. It was recorded as a deed, on the 13th day of January, 1821.

The respondent, Morey, expressly denies in his answer any notice or knowledge of the assignment of the mortgage from Wattles to James, until the fall of the year 1820, and there is no evidence in the case to falsify or impeach this denial. I shall, therefore, consider him in the discussion of this point, at least a *bona fide* mortgagee, standing in equal equity with the appellant, entitled to contest with him, and, if he can, to impeach upon principles either of law or equity, the validity of his prior incumbrance.

It is contended, on the part of the respondent, that admitting the mortgage to have been a subsisting security at the time of its assignment to the appellant, he having neglected to record the assignment, cannot set up the mortgage as against the respondent, who had no notice of its assignment, when he took his conveyance of the 14th June, 1819.

Whether the
assignment
should have
been recorded.

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The registry
act in relation
to military
bounty lands
does not ap-
ply;
Nor do any
registry acts.

Registry not
notice.

Rights of ap-
pellant not af-
fected by the
omission.

If this proposition can be sustained, it must be, I apprehend, upon one of two grounds—either that the assignment of the mortgage was required, by law, to be recorded, or that the respondent stands in the place of the mortgagor, and is entitled to have all, the equities subsisting between him and the mortgagee, at the time when he received notice of the assignment, adjusted and satisfied, before the assignment can take effect.

It was admitted upon the assignment, that the registering act of January, 1794, in relation to military bounty lands, has no application to this case; the premises in question being in the Onondaga reservation, and that reservation being no part of the military bounty lands. And there was no other act requiring deeds, in relation to lands in the Onondaga reservation, to be recorded, until the act of March 23d, 1821, which applied to conveyances only, made after the 1st of July following.

At the time, therefore, when the appellant became the assignee of the mortgage, there was no law requiring him to record the assignment. If he had caused it to be recorded it would have been a voluntary and inefficacious act. In judgment of law, it would have been notice to no one. (*Bushell v. Bushell*, 1 Sch. & Lef. 103. *Latouche v. Dunsany*, id. 157. *Underwood v. Ld. Courtown*, 2 id. 64. *Morecock v. Dickens*, Ambl. 678.) Not to the mortgagor, because he is entitled to actual notice, and would not be affected with the constructive notice resulting from a registry of the assignment, even if it was required by law to be registered. Not to a subsequent grantee or mortgagee, because the law will not intend that to be known, for the existence of which there is no legal necessity. No presumption can be indulged, that if the assignment had been recorded, the respondent would have become apprized of the fact. He was not bound to examine the records. It is not, therefore, to be supposed that he would examine them.

The rights of the appellant, therefore, are not affected by the circumstance of his not having recorded the assignment of the mortgage.

There is no doubt of the position, that the assignee of a mortgage takes it subject to the equities which may exist between the mortgagor and the mortgagee, or which may accrue at any time before notice of the assignment is brought home to the mortgagor. (*Matthews v. Wallwyn*, 4 Ves. Jun. 118. *Williams v. Sorrell*, 4 id. 389.) But this principle, I apprehend, is confined to transactions between the mortgagor and the mortgagee, and from the very nature of things is inapplicable to dealings between the mortgagee and third persons.

If I have been successful in showing that the assignee is not bound to record the assignment, and that a voluntary registry would not be constructive notice to any person, then it necessarily follows, that whatever notice is required to be given must be actual and not constructive ; for I know of no other act which it can be supposed the assignee was bound to perform, from which notice could be inferred, except the act of registering. Now it is utterly impossible for the assignee of a mortgage to know with whom the mortgagee may subsequently deal in relation to the mortgaged premises.

Take the case before the Court. How was the appellant to know, on the 9th day of November, 1818, when he took his assignment, that Wattles, on the 24th day of June, 1819, would convey the mortgaged premises to the respondent. If he had no means of knowing that he was, or was to become, interested in the subject matter of assignment, how could he give him notice that he was the proprietor of the mortgage ?

The case of *Williams v. Sorrell*, (4 Ves. 389,) which the Chancellor cites in support of the broad position, "that all dealings with the mortgagee, before notice of the assignment, are valid," was a case between the mortgagor and the assignee of the mortgagee, and the simple question was, whether, after an assignment of the mortgage, payments made by the mortgagor to the mortgagee, without actual notice of the assignment, were to be allowed. It was held that they were, although the assignment had been registered. The same principle was settled in *Matthews v. Wallwyn*, (4 Ves. 118,) and, I am persuaded, there is not a case to be

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Assignee of
mortgage
takes subject
to equities be-
tween mortga-
gor and mort-
gagee :

But this is
confined to
mortgagor and
mortgagee—
does not ap-
ply to mortga-
gee and third
persons.

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Assignee, tho'
subject to e-
quities of debt-
or, &c., not af-
fected by la-
tent equities of
third persons,
notice.

found, in which the principle has been applied to dealings between the mortgagee and third persons. (Vid. *Clute v Robinson*, 2 John. Rep. 595.)

Indeed, the Chancellor has most clearly recognized and enforced the distinction in the cases of *Murray v. Layburn*, (2 John. Ch. Rep. 441,) and *Livingston v. Dean*, (id. 479.) In the first case he says, "It is a general and well settled principle, that the assignee of a chose in action takes it subject to the same equity it was subject to in the hands of the assignor. *But this rule is generally understood to mean the equity residing in the original obligor or debtor*, and not an equity residing in some third person against the assignee. The assignee can always go to the debtor, and ascertain what claims he may have against the bond or other chose in action, which he is about purchasing from the obligee; but he may not be able, with the utmost diligence, to ascertain the latent equity of some third person against the obligee. He has not any object to which he can direct his inquiries, and for this reason the claim of the assignee, without notice of a chose in action, was preferred in the late case of *Redfearn v. Ferrier & others*, (1 Dow. Rep. 50,) to that of a third party setting up a secret equity against the assignor. Lord Eldon observed, in that case, that if it were not to be so, no assignment could ever be taken with safety. I am not aware that this decision was the introduction of any new principle, in the case of actual *bona fide* purchasers, or assignments *by contract*." In *Livingston v. Dean*, the Chancellor remarks, "Though the assignee of a bond and mortgage takes it subject to all the equity of the *mortgagor*, yet as to the latent equity of a third person against the mortgagee, as possessor of the mortgage, the case is different. The assignee does not take the mortgage subject to *such* an equity, unless he has notice of it expressly or constructively."

Admitting, therefore, that the equity of the respondent, whatever it may be as it respects the mortgagee, had existed at the time of the assignment of the mortgage to the appellant, instead of being bound to give notice to the assignment to the respondent, the appellant would have held

the mortgage discharged from the respondent's equity unless he had personal notice of it.

But it is said that the appellant suffered Wattles to remain in possession of the mortgaged premises after the assignment, claiming as owner, whereby he enabled him to perpetrate a fraud by dealing with the property as his own.

The possession of Wattles was consistent with the claim of the appellant. He claimed only as mortgagee. Wattles was in fact the mortgagor, and according to the established usage of the country, was permitted to retain possession.

The rule, that whoever purchases an estate from the owner, knowing it to be in the possession of tenants, is bound to inquire into the estates those tenants have, (*Taylor v. Stibbert*, 2 Ves. 437, *Hiern v. Mill*, 13 id. 118, *Hall v. Smith*, 14 Ves. 426, *Daniels v. Davison*, 16 id. 249,) and all the consequences which flow from it, are applicable to this case. No such tenant, nor any one claiming under him, contest the rights of the appellant. If Morey was in possession at the time of the assignment to the appellant, it was as tenant to Wattles, either at will, or from year to year; and not as pretending to claim any right of property in the premises. Whatever his rights were, they all accrued subsequent to the assignment. But Morey was not, at that time, in possession. I shall have occasion hereafter to show, that he did not go into possession until December, 1818, at the shortest, and probably not until still later. Johnson, then, the mortgagor, was still in possession. Does he, or any one claiming under him, attempt to impeach the equity of the appellant?

I have already said, that the possession of Wattles, after the assignment, was consistent with it; and if he pretended to be the absolute owner of the property, the law will not charge the appellant with knowledge of such claim; nor can he be held responsible for the consequences which may result from it, however fraudulent they may be, unless he is made a party to the fraud, by proof that he knew that Wattles claimed to have the absolute estate, and, after such knowledge, still left him in possession. Whether knowledge of such claim would make him a party to the fraud,

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Whether suffering Wattles to remain in possession affected appellant.

Wattles being mortgagor, his possession was consistent with claim of appellant.

Rule charging purchaser with knowledge of title of tenant in possession, not applicable.

Morey tenant of Wattles

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Nature and
extent of inter-
est assigned.

Wattles had
legal estate;
and equitable
interest in two-
thirds.

Sabin, the
residue.

Whether
union of the
two estates in
Wattles, ex-
tinguished
mortgage.

Merger, at
law, is when
greater and
less estate
meet in the
same person,
without inter-
mediate estate.

Less estate
merged.

E. g. Tenant
for years, who
acquires re-
version in fee.

Rule in e-
quity same;
but controlled
by intention.

it is not necessary to inquire; for there is not the least evidence in the case to affect him with such knowledge.

I am, therefore, clearly of opinion, that the appellant has not forfeited, by any act, either of omission or commission, any right acquired by him under the assignment of Nov. 9, 1818.

It remains, then, to inquire into the nature and extent of the interest which passed by that assignment. Wattles, at the time of the assignment, had the legal estate as mortgagee in the whole of the mortgaged premises, and the equitable interest of the mortgagor in about two-thirds, under the purchase made by him, at the Sheriff's sale, on the 20th April, 1818. The equity of redemption in the remaining third being in Wm. H. Sabin.

It is contended on the part of the respondent, that by the union of the legal and equitable estates in Wattles, the mortgage became extinguished, at least to the extent in which that union had taken place; that if the mortgage subsisted for any purpose after that union, it was only as an incumbrance upon that portion in which Sabin had the equity of redemption. The assignment to the appellant, therefore, it is contended, passed no interest in the residue.

A merger at law, is defined to be "where a greater estate and a less, coincide and meet in one and the same person, in one and the same right, without any intermediate estate." The less estate is immediately annihilated, or, in the law phrase, is said to be merged, that is, sunk or drowned in the greater. Thus, if there be tenant for years, and the reversion in fee simple descends to, or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more." (2 Black. Com. 177.)

The rule in equity is the same as at law, with this modification, that at law it is invariable and inflexible. In equity it is controlled by the expressed or implied intention of the party in whom the interest or estates unite. (*Compton v. Orenden*, 4 Brown Ch. Cas. 403. 2 Vesey, Jun. 264. *Forbes v. Moffatt*, 18 Vesey, 384. *Wade v. Paget*, 1 Brown Chan. Cas. 368. *Gardner v. Astor*, 3 John. Ch. Rep. 53.)

It was argued for the appellant, that the doctrine of merger is not applicable to this case, because the whole legal and equitable estates, *in the whole subject matter of the mortgage*, were never united in the same person. It is obvious that there was no merger as to that portion of the mortgaged premises, in which Sabin acquired an equitable interest, because he had no legal estate into which his equitable interest could sink. But I have been unable to realize the weight of the considerations which were drawn from this circumstance against a merger as to the residue.

The whole legal and equitable *estates* must unite or there can be no merger. Blackstone says, (2 Com. 103,) "an estate in lands, tenements, and hereditaments, signifies *such interest* as the tenant hath therein." The estate of Wattles, in the mortgaged premises, was his *legal* interest in each and every portion of them. The estate of Johnson in the same premises, was his *equitable* interest in each and every portion of them. When Wattles, therefore, became the purchaser of Johnson's equitable interest in two-thirds of the premises the whole legal and equitable in estates those two-thirds were united in him; and I can perceive no reasons why that might not have been a merger *pro tanto*.

Wiscot's case, (2 Co. Rep. 61,) is a direct authority for the doctrine, that a portion of a particular estate may be merged without the residue. It is there said, "if the reversion be granted to tenant for life, and another in fee, the estate for life is extinct for a moiety; for tenant for life cannot purchase or get the reversion or remainder of the same land, but the estate for life will be merged, *having regard to the estate which he hath gotten in the reversion*." That is, there shall be a merger so far as the particular and residuary estates unite. The tenant in that case having the whole of the estate for life, and a moiety of the reversion, only a moiety of the estate for life merged; leaving him with an absolute estate in one, an estate for life in the residue, reversion in fee in the stranger. This is a case precisely analagous in principle to the one before the Court.

To say that after a merger has taken place there can be no foreclosure of the mortgage, nor any action upon the

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Whether
there can be
merger *pro
tanto*.

No merger
as to part of
Sabin.

*Estates must
unite.*

An estate in
lands, &c., is
such interest
as tenant hath
therein.

Estate of
Wattles his *le-
gal*, estate of
Johnson his
equitable in-
terest.

How 2-3 of
premises
might be mer-
ged

This may be
so at law;

And where
part of mort-
gage merges,
there is noth-
ing to prevent
foreclosure as
to residue.

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Meroy.

bond, and that therefore there can be no merger of a part of the mortgaged premises, is begging the question. There can, strictly speaking, perhaps be no foreclosure as to that portion in relation to which a merger has taken place, because the fact of merger presupposes the annihilation of the equity of redemption, which is the only object and effect of a strict foreclosure. But what is to prevent a foreclosure as to the residue? It can not be questioned that there may be a foreclosure as to one portion of mortgaged premises and not as to the residue. It is the uniform practice of a Court of Chancery to prevent a sale of the whole mortgaged property, where it is made to appear that a portion of it will produce a fund sufficient to pay the mortgage debt; and where it is obvious that it would be either useless or inequitable for the foreclosure to embrace the whole mortgaged premises, there can be no doubt of the authority or the disposition of a Court of Equity to restrict it to a particular portion.

The only difficulty, which it appears to me can possibly arise, is as to the apportionment of the debt; and under the ample discretion which Courts of Equity exercise in relation to mortgage securities, I am persuaded that the difficulty from this source would not be found formidable. All the parties in interest are necessarily brought before the Court. The rights of all are disclosed, and the decree is moulded according to the exigencies of the various and complicated equities of the case. This plastic power of a Court of Equity has never been exercised with more vigor or benignity, than in the Chancery of this state. The case of *Tice v. Annin*, (2 John. Ch. Rep. 125,) is but one of many illustrations which might be produced of the truth of this remark.

Bond may be
sued for bal-
ance.

The same observations are applicable to the difficulty which, it is alleged, would be found in fixing the measure of recovery, in any suit which might be instituted upon the bond, for the balance remaining due after the merger.

I am, therefore, of opinion, that a merger in relation to that portion of the mortgaged premises, the legal and equitable titles in which were united in Wattle, would not be prevented by the fact, that no such union had taken place as to the residue.

It remains, then, to inquire whether there was a merger of any portion of the premises; and this will depend entirely upon the intention of Wattles, either expressed or implied, that there should or should not be a merger.

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The rule upon this subject is perspicuously stated by the master of the rolls, Sir William Grant, in *Forbes v. Moffatt*, (18 Ves. 389.) He says, "it is very clear that a person becoming entitled to an estate, subject to a charge for his own benefit, may, if he choose, at once take the estate and keep up the charge. Upon this subject, a Court of Equity is not guided by the rules of law. It will sometimes hold a charge extinguished, where it would subsist at law, and sometimes preserve it where, at law, it would be merged. *The question is upon the intention, actual or presumed, of the person in whom the interests are united.* In most instances, it is with reference to the party himself, of no sort of use to have a charge on his own estate; and where that is the case, it will be held to sink, unless something shall have been done by him to keep it on foot." The same general doctrine is laid down and acknowledged in all the cases. (*Lord Compton v. Oxenden*, 2 Ves. Jun. 263. 4 Br. Ch. Cas. 398, S. C. *Thomas v. Keymisse*, 2 Vern. 348. *Gardner v. Astor*, 3 John. Ch. Rep. 53. *Mills v. Comstock*, 5 id. 214. *Starr v. Ellis*, 6 id. 393. 2 Fonbl. 162, ch. 6 s. 8.

Merger depends on expressed or implied intention of mortgagee. The rule upon this subject.

One consideration, therefore, is, whether Wattles has done anything to determine that election which he undoubtedly had. If not, the question will be upon the presumption of law under the circumstances of the case.

Whether Wattles did any thing to determine his election.

The first point to be settled under this head of inquiry is, within what period was Wattles bound to make his election whether the equitable and legal estates should remain distinct or become united in his hands; for, until this is determined, we know not what acts or declarations of his are to be taken into consideration. If he was bound to make his election within a given time, six months for instance, then we have only to examine whether, within that period, he did any thing that determined the election. If not, then we resort to the presumption of law which arises upon the

Within what period was he bound to elect?

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Most of the
English cases
have gone up-
on presumed
intention.

case ; and that presumption must control, although it be repelled and contradicted by the clearest and most unequivocal manifestation of his intention, subsequent to the lapse of the given time.

Most of the English cases have been decided upon the presumed intention of the party, there being no evidence of his actual intention. Thus, the case of *Ld. Compton v. Oxenden*, (4 Br. Ch. Cas. 398,) was one of a lunatic, who was incapable of expressing any intention. So also of *ex parte Grimstone*, (Ambl. 706,) and *Powell v. Morgan*, (2 Vern. 90,) *Thomas v. Kemish*, (id. 348,) and *Lawrence v. Blatchford*, (id. 457,) were cases of infancy. An intention in the two first cases, (*Powell v. Morgan*, and *Thomas v. Kemish*,) had been expressed, it is true, by the making of wills, but the Ld. Chancellor, in *Ld. Compton v. Oxenden*, says, "the cases of infants turn upon a supposed intent. The Court saw, in *Thomas v. Kemish*, that it was much more beneficial for the infant that the interest should continue pernal."

But in one
case, the acts
of party
were examin-
ed for a series
of years, and
up to time of
his death.

But in *Forbes v. Moffatt*, (18 Ves. Jun. 389,) the acts of the party were considered and examined for a series of years, and up to the time of his death, for some evidence of his intention as to the continuance or merger of the charge ; and no act of his having been found, which was decisive upon the point ; the case turned upon the legal presumption of his intention, that the charge should not merge, because it was for his interest that it should not. No resort was had to legal presumption of his intent, until the whole period between the time when the estates united and the death of the party, (which was ten years,) had been searched in vain for some conclusive evidence of his actual intention.

The deci-
sions in the
chancery of
this state con-
sidered, as to
the time with-
in which the
party must
elect.

In *Gardner v. Astor*, (3 John. Ch. Rep. 53,) more than three years had elapsed after the union of the legal and equitable estates, before the mortgage was assigned. It was heard upon bill and answer : of course there was no proof in the case, and no act appeared to have been done by Winter, between the time when the two estates come into his hands, and the time when he assigned the mortgage to Gardner. But the Chancellor appears to have put his decree upon the ground that the assignment was in fact made subse-

quent to the conveyance to the defendant Astor; it not having been acknowledged until after that period, Astor swearing that he believed it was not made until after the conveyance to him, and there being no proof to show, as the Chancellor remarks, when it was actually made.

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The case of *Mills v. Comstock*, (5 John. Ch. Rep. 214,) was decided upon its own peculiar circumstances, and the question of election did not there arise. The Chancellor put his decree, upon the ground that the assignment of the mortgage to Comstock was a deed or conveyance within the meaning of the registering act of Jan. 8, 1794, and not having been registered, was fraudulent and void as against Mills; who was a subsequent purchaser for valuable consideration. The assignment being void, the mortgage was to be considered still in the hands of Herrick, and the deed from him to Mills, being the first act of his which legally affected the transaction, must necessarily be considered as conclusive evidence of an election on his part, that the two estates should unite; because that deed purported to convey an estate which it could not convey unless a merger had taken place. But, as I have already remarked, the Chancellor put it upon the ground of fraud.

In *Starr v. Ellis* (6 John. Ch. Rep. 393) the Chancellor does say, "that unless some beneficial interest be shown to require the charge to be kept up, *or the intention to keep up the charge be immediately and duly declared*, it shall merge." Upon an examination of that case, it will be found that the assignment of the mortgage was from a father to his son. The bill alleges the assignment to have been fraudulent. The son appears not to have answered. The father, it is true, denies the fraud, and says the assignment was made in satisfaction of a debt due from him to his son. The proofs taken in the cause are not stated. What they must have been may be inferred from the language of the Chancellor. He says, "the facts warrant the charge of a fraudulent combination between the two defendants to set up the mortgage to the prejudice of the plaintiff's title which he purchased of the defendant, Samuel Ellis. The credit

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of the answer of Samuel Ellis is very much shaken by the proofs against the truth of some of its averments, and I am entirely satisfied, that the mortgage has been fraudulently assigned, and set on foot to injure the plaintiff's title. *The assignment to the son, if even before the plaintiff's purchase, was colorable only. The marks of fraud are upon every part of this transaction.*"

It will be perceived, then, that in the opinion of the Chancellor, this was a case of actual gross and glaring fraud; that the assignment *was colorable only*; and (admitting the mortgage to have been a subsisting security) would have been void, not only against a *bona fide purchaser*, but even against *the creditors* of the father. The question of *merger* did not, therefore, necessarily arise in the cause; for whatever might have been the opinion of the Chancellor upon that point, the assignment must have been declared void on the ground of fraud. The observation of the Chancellor, therefore, "*that the intention to keep up the charge must be immediately declared,*" comes to us with a diminished weight of authority. He must have perceived that the question of fraud controlled the case, and perceiving that, it is not disrespectful to him to suppose, that he gave to the other features of the case a consideration less laborious and profound than he would otherwise have done. In questioning the correctness of that position, therefore, I consider myself as combatting *the impressions merely*, and not the *authority* of the Chancellor. But there was, in truth, in that case, a lapse of 14 months between the purchase of the mortgage by Samuel Ellis and the assignment to his son. And if the case had turned upon the question of merger, all that would have been decided by it is, that if the party in whom the legal and equitable estates unite, does not, within 14 months, declare his intention that they shall or shall not remain distinct, the law will presume his intention from the circumstances of the case. To establish the rule that the intention of the party shall be immediately declared, or the law shall declare it for him, would be virtually to take from him the privilege of election. How is he to make his intention known, except by his acts in relation to the property which is the sub-

ject of the charge? Is not a reasonable time, then, to be allowed him? Is he to be compelled immediately to assign the charge, if he intends to keep it distinct? or to sell the fee, if he intends the charge shall merge?

If the law gives him the privilege of election, it will give him a reasonable time within which to make it. This appears to me to be the good sense of the rule; and it is clearly sanctioned by the authorities to which I have adverted—particularly by the case of *Forbes v. Moffatt*

What is to be considered a reasonable time, must depend, in some degree, upon the circumstances of each case, upon the nature of the charge, the situation of the property, and the circumstances of the individual.

Let us, then, inquire whether Wattles, within a reasonable time after he became the purchaser of the equity of redemption, did any thing which clearly manifested his intention that it should or should not merge in the legal estate. The circumstances relied upon to show that Wattles considered the mortgage as merged, and so intended, are, that after the Sheriff's sale, he entered into possession of the premises—that he repeatedly declared the whole title to the Johnson property (except the interest acquired by Sabin at the Sheriff's sale) was in him—that he offered to sell it, and said he would give a clear title.

It does not appear that Wattles, himself, ever entered into the actual possession of the property. Johnson, the mortgagor, continued in the house until the spring of 1819—that is, for a year after the sale—and Morey, the respondent, took possession of the residue, under some agreement with Wattles, either in the fall of 1818, or the succeeding winter. Reuben West says he entered in December, 1818. Thaddeus M. Wood says the latter part of the year 1818. Wm. Clark says in November or December, 1818. Asariah Smith says in the winter of 1818 and 1819. The witnesses all speak of the whole mortgaged premises; for the 15th interrogatory, to which these answers are responsive, asks when D. Morey, went into possession of the premises contained in the deed marked B. Now the deed marked B is the deed of the 14th June, 1819, from Wattles to D. Morey, for the

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He is to have
a reasonable
time.

And what is
reasonable
time depends
on circum-
stances, &c.

Circumstances
of this case, in
reference to
that point.

Wattles never
in possession.
Morey, the re-
spondent, en-
tered in winter
of 1818-19

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whole of the mortgaged premises. The entry, therefore, of Morey, as the agent or tenant of Wattles, extended not only to that portion, the equity of redemption in which had been purchased by Wattles, but also to that, the equity of redemption in which had been purchased by Sabin. The entry and possession were precisely the same in relation to both portions.

As mortgagee.

The question then is, in what character did he enter—as mortgagee or absolute owner? I answer, as to Sabin's portion, he must have entered as mortgagee, because he had no right to enter in any other character. The inference, then, is irresistible, that he entered into the whole as mortgagee, and mortgagee only. As far, therefore, as the taking possession of the mortgaged premises affords any evidence of Wattles' intention, it is that he meant to keep the legal and equitable estates distinct.

Tousley, Gilbert and Granger's evidence, that Wattles claimed title and right to sell.

Sylvanus Tousley, Thomas I. Gilbert, and Hezekiah L. Granger, all swear, that in the summer of 1818, Wattles claimed to have a complete and perfect title to the Johnson property, and a right to sell and dispose of it, (except Sabin's portion;) and so he most unquestionably had. He had the legal estate by his mortgage, and the equitable by purchase; and he had the power of uniting them whenever he pleased. But does the assertion of that fact afford any evidence of a present subsisting intention to unite them? Clearly not. It is well remarked by the Master of the Rolls, in *Forbes v. Moffatt*, "that the owner of a charge is not, as a condition of keeping it up, called upon to repudiate the estate. The election he has to make, is not whether he will take the estate or the charge, but whether, taking the estate, he means the charge to sink into it, or to continue distinct from it." I lay out of the case all the declarations which Wattles is said to have made, that he had a deed for the property from Johnson. They are clearly incompetent evidence, as against the appellant, of the existence of the deed. Nor do they, in my judgment, afford the slightest evidence upon the point now under discussion.

Nothing found
to determine

The assignment of the mortgage from Wattles to James, is the next event in the order of time; and, indeed, it was an-

terior to the possession of the mortgaged premises taken by Morey. The balance of evidence is, that Morey did not enter until December, 1818. The assignment was on the 9th of November preceding. It was entitled, therefore, to be first considered in determining the intent of Wattles.

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I apprehend there can be no difference of opinion, as to the decisive evidence which this assignment affords of Wattles' intention to keep the charge distinct from the legal estate. It contained a solemn covenant, that the bond and mortgage were a subsisting security, and that the sum of \$12,000, was then due upon it. It was the first act, on the part of Wattles, after the union of the two estates in his hands, which affords any evidence of his intention whether they should be kept distinct or not. It was within six months and a half after he acquired the charge, which I cannot consider an unreasonable time to allow him for making his election. It affords, then, in my judgment, competent and conclusive evidence of the *actual intention* of Wattles that there should be no merger, and precludes all inquiry into the presumption of intent which the law, in the absence of such evidence, might have inferred from the facts in the case.

election till assignment.

The assignment to the appellant is decisive evidence of Wattles' intention to keep the charge distinct from the legal estate.

When the assignment was made, there were no claims or rights in conflict with it. Nothing had been done by Wattles to render it unjust or inequitable to keep the estates distinct, in conformity with his declared wish and intention. No man had dealt with him upon the legal presumption of merger, and no one had a right to question or impeach the transaction between him and the appellant. That the demand of the appellant, for which he took the assignment of the mortgage as security, was just and equitable, as against Wattles, has not been, and cannot be denied. He received for it a full and fair consideration, and unless he has forfeited the rights thus acquired, by his subsequent acts, he is entitled to a full and unconditional enjoyment of them.

I have endeavored to show that the appellant has done every thing which he was bound by law to do. Let us inquire, for one moment, whether the respondent, in dealing with Wattles, exercised the caution which, as a prudent man, he ought to have done. It was a matter of public notoriety,

Whether the respondent exercised the caution which a prudent man

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ought to have
done in deal-
ing with Wat-
tles.

that Wattles had a mortgage upon the Johnson property. It was also matter of record, for the mortgage was registered. The respondent, had legal, and undoubtedly actual knowledge of the fact. When he took his conveyance, therefore, on the 14th of June, 1819, he knew that Wattles' title to the property conveyed originated in a mortgage. He knew, then, that the mortgage was one of the title deeds to the estate. If he knew of the purchase of the equity of redemption by Wattles, he also knew, in judgment of law, that it was in the power of Wattles still to keep the equitable and legal estates distinct. He knew that an assignment of the mortgage by Wattles, immediately, or within a reasonable time after the purchase of the equity of redemption, would determine his election, and pass the legal estate to his assignee. He knew that the possession of the title deeds, if not indispensable, is a measure of prudent precaution on the part of the purchaser; for he took from Wattles the deeds from the Sheriff and Sabin to him. Did he then act with the proper caution, not only in omitting to demand the mortgage, as one of the title deeds, but in omitting to make any inquiry concerning it. If he had asked for the mortgage, and its delivery had been evaded or refused, it would have excited suspicion and inquiry, which would have led to a discovery of the assignment. To whom, then, is negligence imputable, and who has trusted most?

Whether, as
the chancellor
supposed, the
appellant dealt
with a suspi-
cious instru-
ment in taking
the assign-
ment.

The Chancellor says, "The assignee has no right to complain. *He dealt with a suspicious instrument that ought to have put him upon inquiry.* He knew, or was bound to know, for it was matter of record, that Wattles had purchased in the equity to at least three-fourths of the premises. Why did he not record the assignment, and why did he not take a new mortgage? The answer to most of these inquiries is to be found in the considerations which I have already submitted. James had no actual knowledge of the purchase by Wattles. The recording of the Sheriff's deed was not notice to him, in judgment of law; for, by law, it was not necessary to record it. He did not record his assignment for the same reason. He may not have taken a new mortgage,

because he did not know that Wattles had it in his power to give one: or, if he did know it, he understood that a new mortgage could cover but three-fourths of the premises, and he may have taken the assignment, because he preferred security upon the whole to security upon a portion of the premises. The instrument with which he dealt *may have been a suspicious one*, though, I must confess, I have been unable to discover what rendered it so.

But concede the fact, that here was sufficient to put James upon inquiry, and that he did inquire; what discovery could the most diligent investigation have made, which would have warned him against taking the assignment. He would have learned that the legal and equitable estates were both in Wattles—that he had done no act which evinced an intention, on his part, that the former should merge in the latter—that he had neither parted with, nor incumbered either—and that there was no living being whose rights or interests would be, in the remotest degree, affected by his determination to unite or to preserve the two estates distinct. If he had asked the respondent whether he had any interest in the question, he would have learned that he had not. The most diligent inquiry would, therefore, have resulted in a conviction, on the part of the appellant that there was no legal or equitable objection to his taking the assignment. *His right, therefore, is not only first in point of time, but it is supported by the better equity.* I am, accordingly, of opinion, that the decree of his Honor the Chancellor should be reversed.

It will be perceived, that the view which I have taken of the case, has rendered it unnecessary for me to consider whether the appellant's judgment was valid, as against the respondent's mortgage, or not; though I should be inclined to the opinion, that it was not, upon the authority of *Lawless v. Hackett*, (16 John. 149,) and *Brinkerhoff v. Marvin*, (5 John. Ch. Rep. 320,) without having given to the subject much consideration. An examination of the accounts between Wattles and Morey is also unnecessary; for, having come to the conclusion that the appellant's mortgage is first

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The appellant's right is first in point of time, and supported by the better equity;

And the decree should be reversed.

It seems, the appellant's judgment would not affect the respondent, for want of a proper specification.

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Whether
Wattles for-
feited his right
under the
mortgage to
Sabin's pur-
chase, by not
disclosing the
mortgage lien.
What Wattles
acquired of
Sabin enured
to confirm as
assignment.

to be satisfied, the amount, for which the respondent's is to stand, must be perfectly immaterial to the appellant. If there should be any surplus, it may be matter of discussion between Wattles and Morey.

I have also omitted to consider what interest Sabin acquired in the mortgaged premises, by this purchase at the Sheriff's sale. Whether the equity of redemption merely, or the whole estate, in consequence of Wattles' silence as to his incumbrances; because, whatever he acquired passed to Wattles, by his subsequent release, and neither he nor his grantee can set up the fraud to bar the incumbrance of the appellant. If he acquired from Sabin any thing beyond the equity of redemption, it enured to the benefit and confirmation of his deed of assignment to the appellant, and did not pass by his deed to the respondent. (*Trevivan v. Lawrence et al.*, 1 Salk. 276, 2d res. *Palmer v. Ekins*, 2 Ld. Raym. 1550. *Jackson v. Bull*, 1 John. Cas. 90, per Kent, J.)

SAVAGE, Ch. J. (After stating the facts, substantially, as detailed by Woodworth and Sutherland, Justices.)

The object of
the bill.

The appellant seeks to foreclose the mortgage assigned to him, or to recover the money on his judgment against Wattles.

Defence.

The respondent claims to hold the premises in pledge for the objects for which they were mortgaged, and also for a general balance due to him from Wattles.

To determine correctly the rights of the parties, it becomes important to ascertain those of Wattles on the 9th November, 1818.

The mortgage
is still an in-
cumbrance
unless render-
ed inoperative
by the sheriff's
sale.

The mortgage was given upon sufficient consideration, and there can be no doubt that the whole \$12,000, and more were advanced by Wattles. It must then be still a subsisting incumbrance unless it has become inoperative in consequence of the Sheriff's sale of the 20th April, 1818. The Sheriff sold the equity of redemption only. (*Jackson v. Hull*, 10 John. 481.) There is no pretence for alleging that the mortgagee, by his silence at the sale, forfeited his rights. His mortgage was registered, which was notice to all the world; and the judgments upon which the executions issued were

younger than the mortgage. Two witnesses heard Wattles give notice of his claim ; others, though present at the sale, did not hear this notice ; but it is clear that the bidders knew of the mortgage, or they would not have suffered property worth 8 or 10,000 dollars to be sold for 645 dollars. That Sabin knew of the mortgage, is proved by his subsequently conveying to Wattles for a nominal consideration. Whether Wattles had a deed from Johnson, previous to the sale, I think very immaterial, as it must have been of later date than the judgments on which the sale was made. When, therefore, Sabin purchased one-fourth of the mortgaged premises, there can be no doubt that he had a good title to the equity of redemption for so much, whether Wattles had a previous deed or not. Sabin was the owner of this equity of redemption on the 9th November, 1818 ; and as to that part of the mortgaged premises there could be no merger. The mortgage was certainly valid *pro tanto* ; and the appellant's right was complete before Sabin conveyed to Wattles, which was not till the 26th May, 1819. The doctrine of merger, as derived from the decisions in Great Britain and this state, seems to be this : that when the legal and equitable estates become united in the same person, the equitable is merged in the legal estate unless, 1. the party in whom they unite manifest an intention to keep them separate : or 2d, it is manifestly his interest to keep them so ; but when it is indifferent whether they unite or not, or when an intention to unite them is shown, then they shall be united. In this case, it has not been shown that Wattles had any interest in keeping the two estates separate ; and so far as his intentions are in evidence, from his declarations or his acts, previous to his assignment of the 9th Nov. they all go to prove a merger. His declarations that he owned the whole property, and his offers to sell, prove it.

In my opinion, therefore, the assignment of Johnson's mortgage, so far as the property purchased at the Sheriff's sale by Wattles is concerned, can have no greater effect than that of an unregistered mortgage.

At the time when this mortgage was assigned, the appellant took a judgment, which is not impeached as to the fair-

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Sabin acquired the equity of redemption in one-fourth of the premises ;

And as to that there could be no merger.

Doctrine of merger when legal and equitable estates meet.

Wattles not interested to keep them separate, and his declarations, &c., go to prove merger. Assignment as to $\frac{1}{4}$ premises no more than unregistered mortgage.

Appellant's judgment.

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Objected to
as wanting a
perfect speci-
fication.

ness of the transactions between the parties; but a technical objection is raised, that the specification required by the statute, then in force, was insufficient. The decision in the case of *Lawless v. Hackett*, (16 John. 149,) is in point, and shows the objection to be well founded. In the view which I have taken of this subject, it does not become necessary to question the correctness of that decision. It may, however, be proper to remark, in passing, that the evil proposed to be remedied by the law of 1818, was the facility of committing frauds in entering up judgments by confession; as it was the practice, (whatever might be the real consideration,) to state it to be money lent. The legislature, therefore, required the nature and consideration of the debt to be stated in the specification; but when the Court carried it so far as to require every item of the plaintiff's account to be specified the legislature seem to have considered the remedy worse than the disease, and, in 1821, repealed the act.

As the objection to this specification is strictly technical, if it be considered tenable, a technical answer should be received. By the act, a judgment without a specification, shall be adjudged fraudulent as it respects any other *bona fide judgment creditors*, "and every *bona fide purchaser for valuable consideration*, of any lands bound or affected by such judgment." The respondent is not a judgment creditor. He is simply a *mortgagee*. He is not, therefore, technically a *purchaser*: (*Berry v. Mutual Insurance Company*, 2 John. Ch. Rep. 612;) nor do I think the legislature contemplated a mortgage creditor by the terms *bona fide purchaser for valuable consideration*. In the language of the Chancellor, in *Searing v. Brinkerhoff*, (5 John. Ch. Rep. 331,) "purchasers are there mentioned in contradistinction to creditors, and the word is used in the common and popular sense." "The act ought not to be extended by construction; and the ordinary lien of the judgment creditor who might happen through the inadvertence, or the error of counsel, to omit as particular a specification as the act required, ought not to be impaired except in favor of those particular persons, who can bring themselves *clearly and strictly within the letter and within the mean-*

But the respondent is a mortgagee only—not a purchaser, and cannot object the want or defect of a specification.

ing and policy of the exception. In my judgment it is no answer to say that a mortgagee comes within the reason and policy of the act. The legislature may have had wise reasons for excluding mortgagees from the benefits of this act, as well as the act authorizing the redemption of lands sold on execution. (*Matter of Saunders Van Rensselaer v. The Sheriff of Albany*, 1 Cowen's Rep. 501.) It is sufficient for us that *ita lex scripta est*.

I am, therefore, clearly of opinion, that the appellant is entitled to the benefit of his judgment. It was a perfect lien as against the respondent. He admits, in his answer, that he knew of this judgment before the 14th June, 1819, and he did not know till January, 1821, that there was any objection to the specification. All his arrangements were made with Wattles, and his securities taken, under the expectation that the judgment was a lien upon the lands of Wattles, and to be satisfied in preference to his mortgage; and, in December, 1819, this judgment was the only obstacle in the way of an absolute purchase.

The result of my opinion on this part of the case is, that the plaintiff is entitled to the benefit of his judgment, and to his mortgage also, upon the fourth part of the premises purchased by Sabin at the Sheriff's sale, on the 20th April, 1818.

As to the other three-fourths of the premises, the respondent, I think is entitled to preference in the satisfaction of his mortgage, if any thing remains after the payment of James' judgment, unless his rights are affected by other circumstances in the case, constituting the equities of the parties. This part of the case, his Honor the Chancellor thought decidedly in favor of the respondent, and placed much reliance on the fact, that the appellant had neglected to record his assignment. It was conceded on the argument, that the recording acts, which relate to the military lands, have no application to the premises in question, they not being a part of those lands; and this concession destroys that part of the Chancellor's argument, which is predicated on the necessity of recording the assignment. I know of no law requiring the assignment of a mortgage to be recorded.

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And the appellant is entitled to the benefit of his judgment.

And to his mortgage upon one-fourth of the premises, purchased by Sabin.

It was not necessary that the assignment should be recorded.

No law, requiring this.

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Notice to
mortgagor is
alone necessa-
ry.

Assignment
operated as an
unregistered
mortgage as to
three-fourths.

Deed to res-
pondent never
being register-
ed as a mort-
gage,

Is also to be
considered an
unregistered
mortgage.

Appellant
has preference
in this view.

But if re-
spondent's
mortgage take
preference,
this can only
be as to the
specific debt
intended to be
secured by it.

The respon-
dent had other
security from
which he
ought to have
indemnified
himself.

If notice of the assignment is not given to the mortgagor he is protected in any payments he may make to the mortgagee. And this is the extent of the risk run by the assignee, who neglects to give notice of the assignment.

I have already stated, that I consider the appellant's assignment operative as to one-fourth of the premises, and as to the other three-fourths, it must be placed upon the footing of an unregistered mortgage. The respondent's mortgage was recorded as an absolute deed, but was never registered as a mortgage. They are both, therefore, unregistered mortgages. (*Dey v. Dunham*, 2 John. Ch. Rep. 189.) The second mortgage does not necessarily gain a preference unless registered; and not even then, if the second mortgagee has notice of the first mortgage. The rule, "*qui prior est tempore, potior est jure*," applies, unless the appellant has been guilty of fraud or culpable negligence, by leaving Wattles in possession of the mortgaged premises. Fraud is not imputed, and in point of negligence, the parties are equal, "it is a common rule, (say the books) that when of two persons equally innocent, or equally blameable, one must suffer, the loss shall be left with him on whom it has fallen; and here comes in the other rule, that the equities being otherwise equal, the priority of time must determine the right." (*Berry v. Mutual Insurance Company*, 2 John. Ch. Rep. 603.) It seems to me, therefore, that the appellant is entitled to preference as to the unregistered mortgage upon the three-fourths of the property purchased by Wattles at the Sheriff's sale.

But even if the respondent's mortgage were to have preference, it could extend only to the objects for which the indemnity was given, to wit, the Auburn note, and the Wattles and Granger debts. As an additional security, Wattles assigned all his stock, &c., and some other personal property. The parties have presented very contradictory statements as to the amount of the security afforded by means of the personal property. Taking the accounts attached to the respondent's answer, it appears that he had abundant security in this property. And as he knew of the appellant's judgment when he took that security, and did not then doubt its valid-

ity, he was most grossly negligent in omitting to indemnify himself.

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On the whole case, therefore, I am of opinion, that the decree of his Honor, the Chancellor, should be reversed.

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BOWNE, BURT, DUDLEY, GREEN, HATHAWAY, HUNTER, KING, LEFFERTS, MALLORY, and REDFIELD, Senators, concurred in the result of the opinions delivered as above by the Judges.

CRAMER, Senator. In this case, from the facts detailed in the pleadings and proofs, it appears that Johnson gave a bond and mortgage to Wattles, to secure the payment of \$12,000, dated the 24th day of June, and registered the 17th day of July, 1817. The mortgaged premises were sold on the 20th day of April, 1818, by virtue of executions on several judgments docketed subsequent to the execution of the mortgage. Wattles, the mortgagee, became the purchaser, at the sale, of three parcels of the premises, took a deed from the Sheriff, and had it recorded on the 28th day of the same month. William H. Sabin purchased one parcel of the premises at the same sale, and Wattles, on the 9th day of November, 1818, assigned the mortgage of Johnson to the appellant, as security for a debt previously contracted by one Meeker, for \$9331. Wattles, on the 14th day of June, 1819, for a valuable consideration, sold, in fee, the whole of the premises, covered by the Johnson mortgage, to the respondent. Prior to this conveyance, Wattles had purchased of Sabin all his right and title to the mortgaged premises. But this purchase was not made until after the assignment of the mortgage to the appellant.

Summary of
the facts

This is a brief summary of the facts in the case, which I have deemed most material in forming a correct decision. Several other points were made, and all very ingeniously discussed by the counsel; yet it appears to me, from the view, I have taken of the subject, that the real merits are confined to very narrow limits, and depend entirely on the doctrine of merger, as recognized and settled in the Courts.

Merits de-
pend on doc-
trine of mer-
ger.

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Contest be-
tween *bona*
fide creditors.

1st point.

2d point.

Rule is that
when legal
and equitable
claims unite in
same person
the equitable
claim is merg-
ed.

Exceptions.

When it is
indifferent to
him whether
claim should
subsist or not,
't always mer-
ges.

of law and Equity in this country, and that from which we derive our system of jurisprudence.

I will here premise, that I consider this case, from all which has been presented to the Court, a fair contest between *bona fide* creditors to obtain securities for their respective debts or liabilities, from a debtor who was willing to defraud either of them.

I shall first, then, consider whether the legal and equitable estates had vested in Wattles under such circumstances that, in judgment of law, the mortgage was extinguished by merger as to those parts of the premises purchased by him at the Sheriff's sale ; and if so, secondly, whether that part purchased by Sabin, and quit-claimed to Wattles after the assignment, can, by any rule of law, be exempted from the operation of the Johnson mortgage in the possession of the respondent. From all the authorities which I have been able to examine, I consider the rule well settled, and I think it a rule founded upon good sense and justice, that when the legal and equitable claims are united in the same person, the equitable title is merged, and no longer exists except in special cases. In support of this position, the cases of *Gardner v. Astor*, (3 John. Ch. Rep. 53,) *Mills v. Comstock*, (5 id. 214,) *Staar v. Ellis*, (6 id. 309,) and *Compton v. Oxenden*, (2 Ves. Jun. 261,) are explicit and decisive.

The only exceptions to this rule are, first, when there is a declared intention on the part of the mortgagee, that the equitable and legal titles shall continue distinct ; secondly, where an intention to continue the mortgage may be fairly presumed from the acts of the mortgagee ; and thirdly, where the law will presume such intention from the circumstances of the case, without regard to the acts of the mortgagee, which it will do in two cases :—First, when for the interest of the party, the mortgage should continue : And secondly, when from the situation of the parties, (as in the case of an infant,) he cannot make his election. These are all the cases to be found in which the mortgage will be deemed a subsisting incumbrance, when the mortgagee has the legal and equitable estates united in himself. But when it is indifferent to the party, whether the charge should or should not subsist

it always merges. *Forbes v. Moffatt*, (18 Ves. 393.) Do the facts detailed in this case bring it within any of the exceptions above mentioned? To me, it is obvious they do not.

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Evidence
shows inten-
tion to unite
estates.

The testimony taken in this case shows most conclusively, that there was no declared intention on the part of Wattles, that the mortgage should continue. All his acts and declarations before, at, and after the sale, manifest, most unequivocally, an intention on his part to unite the titles and to extinguish the mortgage; such as purchasing of Johnson the equity of redemption; his silence at the sale, and, after sale, representing himself as absolute owner of the premises, and offering to sell them in fee. The fact of his silence at the sale, is supported by every witness who has testified, with the single exception of West, who says that he attended the sale, and after the property was put up by the Sheriff, heard Wattles publicly say, that he had a mortgage on the property executed by Johnson, for \$12,000. But the testimony of West is contradicted, and I think perfectly destroyed by the witnesses examined, who were present at the time; all unimpeached, and ten in number. And how could the declaration of Wattles, in relation to this mortgage, be deemed public, even if it were made to West, when the Sheriff, and every other person present, who has been examined, heard nothing of it. In fact, it is not to be presumed, that Wattles should have made such a declaration in the presence and hearing of those witnesses, as he had before that time declared to most of them, that he had purchased the equity of redemption of Johnson.

Nor can I imagine that any beneficial object, as to Wattles, could exist for continuing the mortgage. Indeed, it was for his advantage that it should merge; for, by the merger, he became absolute owner in fee, and went into actual possession of the premises, whereby he was enabled to obtain a credit from the respondent, which, as mortgagee, he probably could not have obtained.

No benefit
to Wattles
could arise
from continu-
ing the mort-
gage.

There are no circumstances from which the law can raise a presumption in favor of the existence of this mortgage,

No circum-
stances from
which to pre-
sume its con-
tinuance.

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Mortgage being once merged, is always so

Assignment passed nothing except mortgage upon Sabin's purchase, for balance which that part would have to contribute.

Assignee of mortgage takes subject to all equities, &c

Decree erroneous, as to that part purchased by Sabin.

As to this, mortgages not extinct.

either on account of any supposed advantage to Wattles, or any disability on his part to make an election.

The mortgage being thus merged, in judgment of law, no subsequent intention or act of his could make it a valid subsisting incumbrance as to that part of the premises purchased by him at the Sheriff's sale. This is a necessary consequence of the legal principle in relation to merger. The mortgage had become cancelled, and was completely extinct, so far forth as the titles had united in Wattles.

The assignment of this instrument to the appellant, on the 9th November, 1818, therefore, passed nothing, except the rateable proportion which that part of the premises purchased by Sabin would have to contribute. The true test of the assignee's rights is, what interest could the mortgagee give at the time of executing the assignment? That, and that only, could pass to the appellant; for Wattles could confer no greater or other interest than such as he at that time possessed; and if he had legally released three-fourths of the premises to Johnson, from the effect of this mortgage, before the assignment to the respondent, it would hardly be pretended that the assignee, under such circumstances, could hold the parts thus released, still subject to the mortgage; and, in judgment of law, he had thus released before the assignment.

There is no rule more distinctly settled than this, that the assignee of a mortgage takes it, subject to all the equities subsisting between the mortgagor and mortgagee at the time of the transfer. The circumstances of this case clearly demonstrate the propriety, the justice and the necessity of the rule, that whenever the two estates are united, the equitable estate should merge; otherwise, *bona fide* purchasers, using every possible precaution and diligence, might be defrauded or postponed to the assignee of a dormant mortgage.

But the decree of his Honor, the Chancellor, is, in my judgment, erroneous as to that part of the premises purchased by Sabin. In him there was no legal estate into which the equitable could sink. The legal and equitable estates were never vested in Wattles, he having parted with

the former by an assignment of the mortgage to the appellant anterior to his acquiring the Sabin title. Wattles, therefore, had a perfect right, at the time he made the assignment, to pass the mortgage, as to this portion of the premises, to the appellant. And that right, having been thus fairly and legally acquired, in the ordinary course of business, should not be defeated, or at all affected, by a subsequent conveyance from Sabin to Wattles, to which the appellant was an utter stranger, unless, in order to protect himself against an innocent purchaser, he was bound to register the assignment.

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I am of opinion, that the appellant was not bound by any rule of law, (however prudent it might have been,) to record the assignment of the mortgage. It is not embraced in the words of the act relative to military titles: for the premises in question are not included in the military bounty lands, as was assumed by his Honor the Chancellor. Nor was the appellant bound to give notice of the assignment to any person but the mortgagor. The case of *Williams v. Sorrell*, (4 Ves. 389,) relates only to dealings between mortgagor and mortgagee, before notice of assignment, and has no application to dealings between mortgagee and third persons, who are not parties to the original contract. The moneys, therefore, that might arise from the sale of that portion of the mortgaged premises, or so much thereof as would amount to its rateable proportion, ought, in my judgment, to have been awarded to the appellant.

Not necessary
to record the
assignment.

Assignee is not
bound to give
notice to any
except mort-
gagor.

Much has been said on the subject of the appellant's prior judgment. In answer to that, I will only remark, that if any reliance is to be placed on the validity of that judgment, the appellant has a clear and certain remedy at law to enforce it, and ought not to ask this Court or the Court of Chancery to aid him for that purpose.

Remedy on
judgment was
at law

I am of opinion, that the decree of his Honour the Chancellor should be reversed, so far as it respects that portion of the premises purchased by Sabin, and affirmed as to the residue.

BRONSON, CLARK, EASTON, LYNDE, MCINTYRE, OGDEN
THORN and WHEELER, Senators, concurred.

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BOWKER and WOOSTER, Senators, were for affirming the Chancellor's decree.

James

v.
Morey.

For reversal
13.

For reversal
in part, 9.

For affirm-
ance, 2.

Decree of re-
versal.

Order of re-
ference to as-
certain ba-
lance on mort-
gage, &c.

Order of sale.

And how to
dispose of pro-
ceeds.

A majority of the Court being for a reversal of the decree the following rule was thereupon entered :

RULE. This case having been heard, and due delibera-
tion being thereupon had, and the bill, as to the defendant,
Caleb Johnson, having been taken *pro confesso*—It is OR-
DERED, ADJUDGED and DECREED, that the decree of the
Court of Chancery of the 28th day of Oct. A. D. 1822, be,
and the same is hereby reversed and vacated.

And it is further ORDERED, ADJUDGED and DECREED, that
it be referred to one of the Masters of the said Court, to as-
certain and report the balance justly due for principal and
interest, upon the mortgage from the defendant, Caleb John-
son, to James O. Wattles, mentioned in the pleadings in this
cause, and also the balance justly due to the appellant, for
principal and interest, on the bond from James O. Wattles
to the appellant, also mentioned in the pleadings in this
cause.

And it is further ORDERED, ADJUDGED and DECREED,
that upon the coming in and confirmation of the said report,
the mortgaged premises, as the same are described in the
said mortgage from the defendant, Caleb Johnson to the
said James O. Wattles, to wit—All that certain piece or par-
cel of land, (*describing the mortgaged premises*) or so
much thereof as may be requisite, be sold at public auction,
at the court-house in the county of Onondaga, or on the
premises, by any one of the Masters of the said Court of
Chancery, the said Master giving six weeks public notice of
the time and place of such sale, by an advertisement, con-
taining a brief description of the said premises, to be inserted
in a public newspaper printed in the said county, and a copy
thereof to be affixed on the outer door of the said court-house ;
and, further, that the Master making such sale execute to the
purchaser or purchasers of the said premises, a good and suf-
ficient deed or deeds of conveyance for the same, and out of
the proceeds of such sale pay to the solicitor of the appel-
lant, the appellant's costs in the Court of Chancery to be
taxed, and also the balance so reported to be due to him, up-

on the aforesaid bond and judgment, with interest from the date of the report, taking receipts for such payments, and filing the same, with the report of such sale ; and that he bring the residue of the proceeds, if any there be, into the said Court of Chancery, to be applied under the order of the said Court, towards the payment of any balance, to be ascertained as the said court shall direct, that may be found due to the respondent, Davenport Morey, from the said James O. Wattles ; and that the Master make report of his proceedings in the premises, with all convenient speed.

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James
v.
Morey.

And it is further ORDERED, ADJUDGED and DECREED, that the said Caleb Johnson and Davenport Morey, on the request of the complainant or his solicitor, or of the purchaser or purchasers of the said mortgaged premises, deliver over all deeds, demises or writings, whatever, relating to or concerning the said mortgaged premises.

To deliver
title deeds, &c.

And it is further ORDERED, ADJUDGED and DECREED, that the said Davenport Morey, and all persons claiming under him, or who have come into the possession of the mortgaged premises, *pendente lite*, deliver and yield up the possession thereof to the complainants, or to whomsoever shall become the purchaser or purchasers thereof at said sale, on his, her or their producing to the said Davenport Morey, or to the person or persons in the possession of the said mortgaged premises, the deed executed by the Master pursuant to such sale as aforesaid, or that, in default thereof, a writ or writs of execution issue, for the purpose of putting such purchaser or purchasers into such full and peaceable possession.

To deliver
possession to
purchaser.

And it is further ORDERED, ADJUDGED and DECREED, that the record and proceedings be remitted to the Court of Chancery, that this decree may be fully executed.

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Clark
v.
Henry.

GARDNER CLARK, impleaded with FREDERICK DAVIS,
appellant
against
WILLIAM HENRY, respondent.

A conveyance of property absolute in terms, if intended by the parties to be a security for a debt, is a mortgage :

And this, whether the intention is manifested by a written defeasance, executed simultaneously with the conveyance, or by the parol declarations or the acts of the parties.

H. was indebted to C. on promissory notes of \$225, and executed an assignment to C. absolute in its terms, of a mortgage which H. held against one D. for \$1065 03 ; and C. and H. at the same time destroyed the notes : and C. executed to H. a writing, by which he promised to sell the mortgage to H. if he would pay C. \$225 by a certain day ; and H. failed in the payment ; and C. declared several times before the day of payment, that he held the assignment as security for his debt ; *Held*, that the assignment was a mortgage, and not a conditional sale ; and that H. might redeem on paying the debt due to C. with interest.

There is no exception to the rule, that a conveyance which is once a mortgage is always a mortgage.

No agreement in a mortgage, to change it into an absolute conveyance upon any event, will be allowed to prevail by a Court of Chancery.

APPEAL from the Court of Chancery. On the 8th February, 1819, Frederick Davis executed to the respondent, his promissory note and mortgage for \$1065 03, with interest. In March, 1819, the respondent purchased of the appellant a span of horses, waggon, &c., for \$285. Of this sum, 75 dollars were paid when due. The remainder was payable the 1st January, 1820 ; but was not paid at that time. On the 9th July, 1821, the respondent filed his bill in the Court of Chancery against the appellant and Davis, stating, among other things, that on or about the 16th February, 1820, the appellant demanded payment or security for the balance, amounting as he alleged, to \$225 ; and offered an extension of credit to the 1st October following, if the respondent would give security ; that the respondent agreed to secure the payment at the time proposed, by pledging the mortgage ; and an assignment was drawn accordingly, which the res-

pendent supposed was by way of pledge, and which he signed by making his mark, and it was witnessed by one Halstead, who also made his mark, neither the respondent nor witness being able to write or read writing, and no other person being present; that the appellant, at the same time, executed a written agreement to the respondent, which the latter supposed was an agreement to re-deliver to him the mortgage, on his paying the balance; but which he afterwards discovered contained no such agreement. The object of the bill was to redeem, and for the re-assignment and foreclosure of the original mortgage, &c.

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Clerk
R
Henry

The answer of the appellant, admitted that the assignment was for the \$225, but insisted that it was absolute, and was so understood by the parties. The answer further admitted, that after the assignment was executed, the appellant told the respondent he would re-sell and re-assign the mortgage, if the respondent would pay him the 225 dollars; and that the appellant drew and signed a writing, by which he agreed to sell the mortgage to the respondent for \$225, if that sum was paid by the first day of October, then next; that the reason of the mortgage being sold at such a reduced price was the respondent's apprehension, that he should lose the money due upon it, by reason of a supposed failure of title to the mortgaged premises; that he, for this reason, offered to sell the mortgage to the appellant on the terms finally agreed upon. The answer admitted the respondent to be incapable of writing, or reading writing; but denied that Halstead was so.

Proofs were taken in the cause; and Halstead swore that the assignment was made under an agreement, that if the 225 dollars were paid by the 1st October, the mortgage should be re-delivered, and that the appellant declared, at the time, that he took the assignment merely as security for that sum, and gave a writing to the effect, that if the money should be paid by the first October, then the mortgage should be re-assigned; but if the money should not be then paid, the appellant should hold the mortgage.

In February, 1890, the appellant declared to one Barker, that he held the mortgage as security for money due from

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the respondent, and if it was not paid by the next fall, he should hold the mortgage. He repeated the same declaration to Barker, at a subsequent day, before the money was due, and after it became due he told the respondent, in the presence of Barker, that the day had been when he (the respondent) might have saved himself, but he had not stirred; that it was then too late, and he (the appellant) meant to cut and scar.

On the part of the appellant, the proof was, that the respondent declared to one Eldridge, that he had sold the mortgage to the appellant, and did not care whether he ever got any thing upon it or not, and gave as a reason for selling it, at a reduced price, that he apprehended losing it on account of a reported failure of title to the mortgaged premises. He made a similar declaration to one Barker, adding that if he paid the appellant, the latter was to sell him the mortgage back again. He also declared to one Colton that he had sold the mortgage to the appellant, and had been paid to his full satisfaction. He made a similar declaration to one Van Auker.

The 225 dollars, due from the respondent to the appellant, were secured by the promissory notes of the former, which were destroyed at the time of assigning the mortgage. In February, 1821, the respondent tendered to the appellant the debt due to him, and in April following, he forbade Davis' paying the money due on the mortgage, to the appellant; notwithstanding which, on the 28th May thereafter, Davis obtained the appellant's release of the mortgage, on paying a part and substituting other security for the residue.

The Chancellor decreed, that the assignment was by way of mortgage—that the defendants below, or one of them, should pay the balance due on the original mortgage, with the costs of the suit, and that the mortgaged premises should be held chargeable, &c.

The reasons of the (late) Chancellor, for this decree, were thus assigned :

It is clearly established by the answer and the proofs, that the bond and mortgage were assigned by the plaintiff to the

defendant Clark, by way of mortgage, to secure the payment of \$225 by a given day, and any agreement that the assignment was to be an absolute sale, without redemption, upon default of payment on the day, was unconscientious, oppressive, illegal and void. The equity of redemption still existed in the plaintiff, notwithstanding any such agreement.

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Henry.

There is no principle in Equity better settled, than that every contract for the security of a debt, by the conveyance of real estate, is a mortgage ; and all agreements of the parties, tending to alter in any subsequent event the original nature of the mortgage and prevent the equity of redemption, are void. If the conveyance or assignment was a mortgage in the beginning, the right of redemption is an inseparable incident, and cannot be restrained or clogged by agreement. Though the conveyance be absolute in terms, yet if the intention appear, to make the estate redeemable, it will continue so until foreclosure ; for the maxim of Equity is, that the estate cannot be a mortgage at one time and an absolute purchase at another. This is an elementary rule on this subject, and the object of it is to prevent imposition and fraud on the mortgagor.

The original design of the assignment in this case, being admitted to be by way of pledge or mortgage for a debt, and this design being contained in a collateral instrument executed concurrently, by the defendant Clark, it seems to put an end to all question as to the right of redemption. And upon a tender of the 225 dollars with interest, in February, 1821, the plaintiff was entitled to a re-assignment of the bond and mortgage ; and any payment and discharge of the mortgage, afterwards, by negotiation between the two defendants, was fraudulent and void as respected the plaintiff. It is satisfactorily shown, that the defendant Davis had notice of the plaintiff's claim upon the bond and mortgage, prior to the negotiation and settlement, between him and the defendant Clark, and the same was made at his peril and in his own wrong. It was, according to my judgment of the facts, a fraudulent combination, between the two defendants, to deprive the plaintiff of his rights.

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v.
Henry.

The plaintiff has been treated by the defendant Clark, with great injustice, and it is incredible that he should have agreed to sell absolutely, a bond and mortgage, well secured, (for nothing appears to gainsay this presumption,) for upwards of 1000 dollars, for the grossly inadequate sum of 225 dollars. The right of redemption rests in this case upon the most obvious principles of Equity. It is just and proper, that Clark should pay the balance due to the plaintiff, since he has appropriated the bond and mortgage to his own use and discharged the same, after receiving payment of part and taking new security on new terms for the residue.

S. M. Hopkins, for the appellant, made the following points :

1. The distinct ground of the bill is *fraud and imposition* in the terms of the writings ; the contracts being fraudulently stated to an unlettered man. But this ground is abandoned when the interrogatories are drawn up, and is not at all supported by the testimony, nor relied upon in the decree.

2. All the testimony of the complainant below goes, only to alter a written contract, by parol, or to set up a contract by parol, against the terms of a written contract.

3. The decree goes upon the ground, neither of the fraud alleged in the bill, nor the parol matter shown in evidence against the writing,—but upon the ground that the papers, as they stand, constitute a mortgage—whereas upon the case as proven, it is not a mortgage, but a conditional sale.

4. All the allegations, of fraud in the appellant, are completely disproved.

5. This was the case of a contract of hazard, and is no more to be altered by the event of the risk in question, than a chance in a lottery or an insurance.

6. The respondent had no claim upon Davis for payment, without offering him an indemnity.

In support of the 3d point he relied upon the fact, that at the time of the assignment the promissory notes, given by the respondent for the debt, were surrendered and destroyed. He said the original debt was gone. There cannot be a mortgage unless to secure a debt ; but Henry was left under no obligation to pay. Had the assignment proved unavailing, or the mort-

gage from Davis unproductive, the appellant would have been without remedy. A personal obligation to pay is of the essence of a mortgage. The transaction between these parties was a mere accord and satisfaction for the debt. Where the grantee of lands subject to a limited power of redemption, has not all the remedies of a mortgagee, the conveyance is not a mortgage but a limited sale. Therefore, where lands were conveyed in lieu and satisfaction of a portion charged on them, with a clause of redemption if the portion were paid in ten years, there being no covenant for the payment of the portion, nor any collateral security, a redemption was refused after ten years; for, if the produce of a sale of the lands were insufficient to discharge the portion, the grantee could have no remedy against the grantor, to recover the deficiency. (a) The fair criterion, in Equity, to determine whether a deed be a mortgage or not, is, are the remedies mutual and reciprocal? (b) Has the grantee all the remedies that a mortgagee is entitled to? This is like a lottery or insurance transaction. A discount is allowed by way of premium, and the assignment is without recourse.

S. A. Foot, for the respondent, stated the following points:

1. The Court of Chancery will always relieve against a forfeiture, or loss, resulting from the non-payment of money on the day, if compensation can be made; and interest of the money is always held to be an adequate compensation. (c)

2. An absolute conveyance of real or personal property, with an agreement to re-convey in case a sum of money is paid by a certain day, is a mortgage. (d)

3. Every conveyance of real and personal property, made with a view to secure a debt, is a mortgage—and it will be so regarded in Equity if the object of the conveyance is made out by parol or written evidence. The facts in this case show, that the object of the assignment of the note and mortgage, was to secure the \$225 due to Clark. (e)

4. Any agreement made at the time, or subsequent to the giving of a mortgage without any new consideration, tending to embarrass or defeat the right of redemption after

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(a) *Goodman v. Grierson*, 2 Ball & Beatty, 274.

(b) *Id.* 279.

(c) *Wallis v. Crimes*, 1 Ch. Cas. 89. 1 Eq. Cas. Abr. 113, S. C. *Cage v. Russel*, 2 Vent. 352. 1 Mad. Ch. 27, 8, and the cases there cited. *Skinner v. Dayton*, 2 John. Ch. Rep. 535, per Kent, Ch. *Skinner v. Dayton*, 17 John. Rep. 365, per Spencer, C. J. *id.* 369, per Yates, J. *Manlove v. Ball*, 2 Vern. 84.

(d) *Dey v. Dunham*, 2 John. Ch. Rep. 189. *Peterson v. Clark*, 15 John. 205. *Dunham v. Dey*, *id.* 255. *Manlove v. Bull & Bruton*, 2 Vern. 84. 1 Eq. Cas. Abr. 313, S. C.

(e) 1 Pow. on Mort. 156 to 154. 1 Mad. Ch. 414 to 418, and the cases cited by these authorities respectively.

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forfeiture of the mortgage, is held in Equity to be illegal, oppressive and void.(f)

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5. The conduct of Clarke merits the adjudication of costs against him.

(f) Id.

He remarked, that in *Dunham v. Dey*, the defeasance was executed more than a year after the deed, yet holden a mortgage.

(g) Vid. *Gillespy v. Moon*,
2 John. Ch.
Rep. 590, and
the cases there
cited by Riggs
& Mitchell,
arg.

Hopkins, in reply said, no attempt is made to answer the appellant's point grounded on the statute of frauds. A sealed instrument cannot thus be defeated by parol.(g) Nor has the objection, that an agreement in restraint of the right to redeem is void, any application to this case. Here never was any right to redeem. The assignment was absolute from the nature of the transaction. The debt was destroyed at the moment of its execution and all collateral remedy gone. Suppose the mortgage had turned out to be not worth five straws—we never could have recovered the balance, of Henry. It was a mere conditional sale, within the case from *Ball & Beatty*, and the condition precedent not being performed, we are under no obligation to re-convey.

Bill.

WOODWORTH, J. The bill states that at the time the assignment was made, the appellant declared it was by way of pledge, and that the instrument in writing delivered to the respondent was an agreement to re-deliver the mortgage on payment of \$225. In the answer, the appellant alleges, it was an absolute sale and transfer, but he admits that he agreed to re-sell and re-assign, if the respondent paid \$225, on or before the first of October, then next; that he wrote and signed an instrument to that effect.

Answer.

Halsted's
evidence.

William Halstead, a subscribing witness, testifies, that Clark gave Henry a writing, which specified, that if Henry paid the money by the first of October, he was to re-assign; if not, Clark was to hold the mortgage. This does not vary materially from the writing stated in the answer. There is no magic in the words "*agreeing to sell the mortgage*," to distinguish the case from an agreement to re-assign. Halsted is not contradicted as to the fact, that the assignment was received as a security.

There is proof that, afterwards, the respondent admitted it was a sale, and the appellant admitted it was a security.

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Without reference to the construction which the law would put on the transaction, I am satisfied, that, at the time, neither party considered the assignment an absolute sale. If it was not, the respondent had a right to redeem and is not barred by non-payment at the day.

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Henry.

Parties understood it to be a mortgage.

The case warrants the inference, that Clark supposed the papers were so drawn as to defeat the right of redemption, if there was a failure of payment, and that the word "sell" was inserted, instead of the more appropriate term *re-assign*, so as thereby to obtain a mortgage of \$1065, for the inadequate consideration of \$225.

Clark supposed there was a clause of redemption.

The whole operation, seems to be devised for the purpose of overreaching an ignorant man who could neither read nor write.

Operation was to overreach an ignorant man.

There cannot, however, be any doubt, that the writing executed by the appellant was *per se* a defeasance merely. On what terms was the appellant to sell? Not for the value of the security, but the amount of the original debt not equal to one-fourth of the mortgage. This speaks a language not to be mistaken. The instrument must be constructed as a covenant to re-assign.

Writing was a defeasance.

The right to redeem is carefully protected by Courts of Equity. They will not suffer an agreement to prevail, that the estate shall become an absolute purchase in the mortgagee, upon any event whatever. The reason of the rule is, because it puts the borrower too much in the power of the lender, who being distressed at the time is generally too much inclined to submit to any terms. There is no exception to the rule, "once a mortgage, and always a mortgage." (1 Mad. 413.) No agreement of the parties can affect the doctrine as to redemption in a Court of Equity. In *Seton v. Slade*, (7 Ves. Jun. 273,) Ld. Eldon observes, "you shall not by special terms, alter what this Court says are the special terms of that contract." I refer to the following cases which fully support these principles. 2 Cha. Ca. 58, 159, 147. *Toomes v. Conset*, 3 Atk. 261: 1 Vern. 8, 33. *Floyer v. Livingston*, 1 P. Wms. 268.

Right to redeem, carefully protected.

Once a mortgage always a mortgage.

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Henry.

Notice to
Davis.

The respondent in April, 1821, gave notice to Davis that he should look to him, and forbade his making payment to Clark. In May following, Davis made a settlement with Clark, and accepted a discharge. He appears to have been fully apprised of the circumstances, and took upon himself the risk of being answerable to the respondent. He cannot justly complain, in being made liable for the balance that may remain due after execution against the appellant shall have been executed and exhausted.

I am of opinion, that the decree of his Honor, the Chancellor, be affirmed.

SUTHERLAND, J. concurred.

SAVAGE, Ch. J. (after stating the facts.) I concur fully in the opinion given by his Honor, the Chancellor. The assignment was intended merely as a security, and not as an absolute sale. Such was the understanding of the witness, Halstead, and such is the reasonable construction upon the acts of the parties.

Absolute deed,
with written or
parol defea-
sance, is a
mortgage.

That a deed, absolute on its face, but accompanied by an agreement, in writing or by parol, operating as a defeasance, is a mere mortgage, is perfectly well settled. (*Dey v. Dunham*, 2 John. Ch. Rep. 189. *Paterson v. Clark*, 15 John. Rep. 205.)

The character of the transaction between the parties being established, the rights of mortgagor and mortgagee are easily ascertained.

No agree-
ment allowed
to change
mortgage into
absolute deed.

It is a well settled principle, that Chancery will not suffer any agreement in a mortgage to prevail, which shall change it into an absolute conveyance upon any condition or event whatever. (*Howard v. Harris*, 1 Vern. 190. *James v. Oades*, 2 id. 402.) "Once a mortgage, always a mortgage." In *Newcomb v. Bonhan*, (1 Vern. 7,) where an absolute conveyance was given, with a defeasance upon payment of £1000, during the life of the grantor, and the grantor covenanted, that it should never be redeemed after his death; yet redemption was decreed.

Once a mort-
gage always a
mortgage.

The respondent was, in this case, clearly entitled to redeem; and the decree of the Chancellor should be affirmed.

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v.
Lion.

This being the unanimous opinion of the Court, it was thereupon ORDERED, ADJUDGED AND DECREED, that the decree of his Honor, the Chancellor, made in this cause, be in all things affirmed; and that the appellant pay to the respondent his costs in this Court, to be taxed; and that the record and proceedings, &c., be remitted, &c.

CHARLES WILKES and THE PRESIDENT, DIRECTORS,
AND COMPANY OF THE BANK OF NEW YORK, plain-
tiffs in error.

against

EDWARD LION, *ex dem.* MEDCEF EDEN and JOHN WOOD,
otherwise called JOHN WOOD, JUNIOR, assignee of MED-
CEF EDEN, defendant in error.

E. died in September, 1798, having, by his last will, dated August 29, 1798, devised lands to his son Joseph, in fee; and other lands to his son Medcef, in fee; and added, "It is my will, and I do order and appoint, that if either of my said sons should depart this life, without lawful issue, his share or part shall go to the survivor; and, in case of both their deaths, without lawful issue, then I give all the property, &c. to my brother John E. of, &c. and sister Hannah J. of, &c. and their heirs." Joseph, one of the sons, died in August, 1812, without lawful issue, leaving his brother M. surviving, who afterwards died on the 26th July, 1819, without lawful issue: *Held*, that on the death of the testator's son Joseph, the limitation over, which was good as an executory devise, vested in M. the surviving son:

And per Sanford, Chancellor, concurring with the Court below, the devise in his favor, having taken effect, ceased to be executory, and he became seised in fee tail, by necessary implication of law, with a remainder expectant in favor of John E. and Hannah J. the brother and sister of the testator; and by virtue of the statute of the 23d of February, 1786, abolishing estates tail, M. became seised, in fee simple absolute, of all the estate devised to his brother Joseph.

But per Cramer, Senator, the devise to John E. and Hannah J. was originally limited upon too remote a contingency, to wit, an indefinite failure of issue in the two previous devisees. This not being qualified, like the

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v.
Lion.

devise over to Medcof, by the word *survivor*, the last devise was void for this reason.

No division of the Court was taken as to the ground upon which they denied operation to the last devise; but they voted *generally*, to affirm the judgment below.

A person holding land by *deforcement* merely, cannot levy a fine so as to affect or bar a stranger to it:

And, accordingly, B. having purchased Joseph's interest in his lifetime, and levied a fine thereof; *held*, that this would not bar the right of Medcof.

When the first of several executory devises vests in possession, those which follow, vest in interest at the same time, and ceasing to be executory, become vested remainders, subject to all the incidents of remainders. *Per* Sanford, Chancellor.

No remainder can exist without a preceding estate to support it. *Id.*

Whenever a devise of a future interest can take effect as a remainder, it shall be so considered, and not as an executory devise. *Id.*

Our laws allow the owner of lands to devise them according to his affections or his pleasure. *Id.*

Rule recognized, that an executory devise shall not prevail, when it extends beyond a life or lives in being, and 21 years and 9 months afterwards. *Id.*

All dispositions in the nature of entails are opposed to the policy of our institutions.

It seems, that estates tail are not simply abolished and thrown back to fees conditional at the common law, either by the statute of 1782, the statute of 1786, (vid. 1 Greenleaf, 205. 1 Kent & Radcliff, 44. 1 Woodworth & Van Ness, 52,) or by the statute of 1788, repealing all the English acts. (Vid. 2 Greenleaf, 116, s. 37. 1 Kent & Radcliff, 358, s. 28. 1 Woodworth & Van Ness, 526, s. 30.) But these statutes suffer the estate tail to arise, and then change it into a fee simple.

The maxim *stare decisis* considered, *arguendo*, by counsel; by Root, President, Sanford, Chancellor, and Wheeler, Senator, in the course of discussion; and by Cramer, Senator, in delivering his final opinion in the cause.

Construction of devise. Authorities cited that a will must be construed throughout as it should have been at the instant of the testator's death, and cannot be varied by subsequent circumstances. *Per* Jones, counsel, immediately after the close of the attorney general's argument.

Seisin of the deviser. Authorities cited showing that he must be seised at the time of his death; otherwise devise cannot take effect. *Id.*

Ejectment. Authorities cited, that if the interest of the plaintiff's lease expire after the commencement of the suit, and before judgment, he shall have judgment and execution for his damages, but not for the land. *Id.*

Ejectment. Authorities cited and considered, which show the exceptions to the rule that the defendant may protect himself by showing an outstanding title. Burr, counsel, *arguendo*. Answer by Jones, counsel, at the close of his reply.

Evidence. Authorities cited, showing that after a man's absence for seven years without being heard of, he shall be presumed dead. Burr, counsel, *arguendo*.

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Wilkes
v.
Lion.

ERROR from the Supreme Court. This was one among several causes, the fate of which was supposed to have been fixed by the decision in *Anderson v. Jackson*, (16 John. Rep. 382.) The present cause related to the same subject matter, and involved a construction of the same will, which called forth such elaborate discussion in that cause, not only from the counsel but the Court of Errors. (Vid. the opinion of Yates, Senator, id. 435, and the dissenting opinions of the late Chancellor Kent, and Hammond, Senator, id. 397, 424.) Speaking of the prominent point in that case, Chancellor Kent remarked, "This may well be considered a grave and important question, demanding the utmost care and attention on the part of this Court; for it was said, on the argument, that property, to the value of *half a million of dollars*, depended upon the decision to be made in this case."

The circumstances out of which this litigation arose, are briefly these: Medcef Eden, the elder, being seised in fee of the premises in question, and having two sons, Joseph and Medcef, made his will, dated August 29th, 1798, by which he devised certain real estate in the city of New York and its vicinity, including the premises in question, to Joseph and his heirs, &c., and assigns; and certain other real estate to Medcef and his heirs, &c., and assigns; and then added, "If either of my said sons should *depart this life without lawful issue*, his share or part *shall go to the survivor*—and in case of *both their deaths without lawful issue*, then I give all the property aforesaid to my brother, John Eden, of Loftus in Cleveland, in Yorkshire, and my sister, Hannah Johnson, of Whitby, in Yorkshire, and their heirs."

Medcef Eden, the elder and deviser, died seised, September 8, 1798, and his son Joseph took possession, as devisee. Between the 16th of May, 1801, and his death, all his interest under the devise passed into other hands by a sale upon several writs of *fi. fa.* against him, the Bank of New York, one of the plaintiffs in error, being the principal pur-

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chaser. A part of this interest came to Anderson. Joseph died on the 20th August, 1813, without lawful issue.

On the 16th April, 1816, the Bank of New York conveyed the subject of their purchase by deed of bargain and sale in fee simple to one Goelet, to make him a tenant to the *præcipe*, in order to levy a fine which was completed January term, 1817. The writ of covenant was tested January 13th, 1816, the first proclamation was in May term, 1816, and the last in January term, 1817.

One question in this suit was, whether this fine was not void, because the parties thereto had no estate in the premises.

The claim of Anderson had been determined against him, independent of this last point, in *Anderson v. Jackson*, on error, January, 1819.

May 16th, 1819, Medcef, the younger, entered to avoid the fine, and demised to Lion, the defendant in error.

It was supposed that *Anderson v. Jackson* had settled the controversy in relation to the entire subject of the devise to Joseph ; but before the trial of this cause, (Dec. 2d, 1820,) Medcef, the younger, died without issue, having made a will, &c., which gave rise to the additional question, whether the premises had not passed, by the ulterior devise, to John Eden and Hannah Johnson.

This suit was on the demise of Medcef Eden, the younger, to Lion, in the lifetime of the former, for 15 years from the 6th May, 1819. The lease was actually executed as laid in the declaration. At the trial, a special verdict was found containing the material facts as above stated, on which the Supreme Court gave judgment for the plaintiff, January term, 1823.

The reasons for this judgment were assigned as in 20 John. Rep. 486 to 492.

For a more particular account of the facts, see 20 John. Rep. 483, (S. C.) and *Anderson v. Jackson* (16 John. Rep. 382.)

Talcott, (Attorney General,) for the plaintiffs in error stated the following points ;

1. That Joseph Eden was seised of an estate in fee simple, absolute in the premises in question, at the time the judgments against him, under which the title of the plaintiffs in error is derived, were docketed; and the plaintiffs in error, or those under whom they hold by the Sheriff's sale and conveyances by virtue of the executions on those judgments, acquired a valid and effectual title to the premises in fee simple.

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2. That the estate of Medcef Eden, the younger in the premises in question, if he had any estate or interest therein, was (in the events that happened) an estate for life, which was terminated by his death. His interest, if he had any interest in the premises, being at most, that of a tenant under an executory devise, determinable by his death without issue; and he having died without issue, his title, and that of all persons claiming title from or under him, was determined.

3. That the fine barred all the right of Medcef Eden, the younger, to the premises in question, if he ever had any right thereto.

4. That the plaintiff in the suits in the Supreme Court was not entitled to any judgment on the special verdict in the cause; or if he was entitled to any judgment, he could only be entitled under the circumstances of the case, to judgment for the damages found by the jury, and not to judgment for the term, or any estate or interest in the premises in question.

5. That the judgment of the Supreme Court is erroneous and ought to be reversed.

1. For the situation of real titles in England, before the statute *de donis*, the Court are referred to 1 Reeve's History of the Common Law, 294. The case of a conditional fee is there stated much like the present. I refer to this author, because Blackstone^(a) has limited his attention principally to that class of conditional fees at which the statute *de donis* was particularly aimed, and which were changed by it into estates tail.^(b) These were estates to a man and the heirs of his body, or the heirs male of his body, &c., or to the heirs of his body and on failure of these then over; in

^(a) 2 Bl. Com
110.

^(b) 1 Reeve's
Hist. C. L.
395. 3 id. 4, 5

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(c) 13 ed. 1.

(d) 2 Bl. Com.
112, Litt. 2.
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(e) 2 Bl.
Com. 112.

(f) 2 Reeve's
Hist. C. L.
166. 3 id. 4, 5.

(g) 32 H. 8.
c. 1. 34 & 35
H. 8, c. 5. 12

Car. 2, 24. 1
Greenleaf,
386, 7. 1 K.

& R. 178. 1
Woodworth &
Van Ness,
364.

(h) 1 Burr.
38.

(i) 2 Wils. 88.
(j) 7 T. R.
585.

(k) 1 East,
229.

which cases, on the donee having issue, the estate became absolute, and he might convey. Reeve(c) states a variety of other cases. The statute of Westminster, 2, recited the mischief which attended these fees conditional, and provided that the will of the donor should henceforth be observed, by the reverter of the estate on failure of issue.(d) Upon the construction of this act; says Blackstone,(e) the Judges "divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a *fee tail*; and vesting in the donor the ultimate fee simple of the land, expectant on the failure of issue;" and they admitted of no such thing as a fee conditional.(f)

After the statute of wills,(g) the doctrine of the statute *de donis* was transferred to these; that is to say, the intent was to be pursued; but on this head the Courts have found very great difficulty in construing the intention. One rule which they have adopted is, that where the testator appeared to have one great general intent, the particular intent shall yield to it. This rule as to the question whether the devisee shall take an estate tail, is exemplified in *Robinson v. Robinson*,(h) *Driver v. Standring & Hoole*,(i) *Roe v. Jeffrey*,(j) and *Doe v. Cooper*.(k) Now, there were two objects to be accomplished by this limitation: One was to provide for the issue of Joseph indefinitely, which could be accomplished only by the creation of an estate tail; another was a limitation over to Medcef on the failure of Joseph's issue, with the same object of providing indefinitely for the issue of the latter. A devise in fee simple generally would have defeated the intent by placing the subject in the power of the first taker, or if in fee tail, the contingency was too remote to warrant a limitation over. If we are correct in saying that the testator intended to provide for the issue of the first taker indefinitely, then, whatever estate may have been created by these words under our law, it cannot go over; and it must share the same fate, if it amounted to an estate tail.

The words *dying without issue*, import an indefinite failure of issue, not only in their legal and technical sense, but

such was probably the ancient popular meaning of the phrase. The writ of *formedon in the remainder* always alleged that the donee died 'without heir of his body issuing ;(*l*) and the allegation was satisfied by proof that issue failed either at his death, or at any time afterwards.

It is a general principle in the construction of wills, that when a testator uses words which have been defined by judicial decision, he must be considered as speaking conformably to legal definition, unless there are other circumstances clearly indicative of a different intent.(*m*) It is material, then, to see whether there is, by the English decisions, any settled construction of the words, *dying without issue* ; and of this there is no doubt. It is perfectly well established there, that these words, uncontrolled, give an estate tail to the first taker, and the limitation over is a remainder ;(*n*) and, though, in common conversation, they might mean a *failure of issue, living at the time of the donee's death*, yet unless this meaning is plain from other words of parts of the will, the ancient signification must prevail. We admit that these words are not absolute and uncontrollable ; but are there any circumstances here to take them out of the general rule ? The first devise is of one piece of property to Joseph, his *heirs and assigns* ; the second of another and separate piece to Medcef, his *heirs and assigns*. Though these words purport to give a fee simple ; yet if the limitation over is understood to be upon an indefinite failure of issue, they create but a fee tail. In *Doe v. Ellis*,(*o*) Lord Ellenborough, Ch. J. says of a will, containing a disposition similar to the one under consideration, that "the premises, however large, may be restrained by the context, as premises, however narrow, may be enlarged by it." That the word *assigns* is added, does not vary the case.(*p*) In *Doe v. Ellis*, the Ch. J. says, "as to the word *assigns*, which follows heirs, we cannot collect any different intention from the addition of it, than if the word *heirs* alone had been used. Whether an estate be given to a man and his *heirs*, or to him and his *heirs and assigns*, must be the same thing in legal construction." The words, *depart this life, without, &c.* are of precisely the same

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(*l*) Booth,
152.

(*m*) *Coun-
den v. Cleek*,
Hob. 33. *Id*
v. *Id*, 5 Mass.
Rep. 501, per
Parsons, C. J.

(*n*) *Doe v.
Ellis*, 9 East,
386. *Tenny v.
Agar*, 12 id.
261. Most of
the cases on
this head, En-
glish and
American, are
cited and com-
mented upon
by Kent,
chancellor, in
*Anderson v.
Jackson*, 16
John. Rep.
405 to 424.

(*o*) 9 East,
386.

(*p*) 2 Fearn,
4 ed. 203 to
209. *Roe v.
Scott*, id. 203.
*Porter v.
Bradley*, 3 T.
R. 206, and
vid. 3 Leon. 5.

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(q) *Roe v. Scott*,
Fearn, 4 ed.
203. *Denn v. Clark*,
Coxe's N. J.
Rep. 340.
(r) 7 T. R.
59^c

legal import as the more usual words *shall die*, without &c. (q) In *Roe v. Jeffrey*, (r) the words were precisely the same as used here, yet the words *depart this life* were not relied upon as varying the technical import.

Here, then, is nothing to take these words out of the general rule, except the single word *survivor*; which is relied on to show that Joseph took a fee simple determinable by his death, without issue then living, and that the estate, therefore, passed over as a contingent remainder.

A. Burr, for the defendant in error, wished to be informed whether counsel proposed to question the case of *Anderson v. Jackson*? (16 John. 382.)

Talcott. This must depend upon the Court.

Burr. It was there solemnly settled, that the limitation over from Joseph to Medcef, was an executory devise. Perhaps hundreds of wills may have been drawn in reference to that very decision. Will not the barely allowing it to be questioned, impair that confidence in your stability which should be jealously maintained? It was but the other day that you stopped counsel upon the same ground; (s) telling them that a point once settled by this Court was not again to be questioned here. Permitting a contrary course would be alarming in the highest degree. What case can be relied on as fixing the law of the land?

(s) *N. Y. F. Ins. Co. v. De Wolf*,
66, 70. ante,

M. Van Buren, (same side.) The first point made by the plaintiffs in error is, that Joseph Eden had a fee simple absolute, and it is now proposed to infer this from the fact that the operative words would have created an estate tail under the statute *de donis*. Now, we say, that matter is not to be debated. It is not open. It was closed in *Jackson v. Anderson*. It was there decided, in so many words, that the phrase in question would not have created a fee tail, but that it did create a fee simple, determinable upon Joseph's death, without issue. This was the precise point determined, arising too upon this very will. To prove the importance of adhering to an uniform rule of decision, he read from

1 Bl. Com. 10. 11 ; and he remarked, that in *Foley v. Burnell*,^(t) the House of Lords pursued the same course which this Court lately took in *The New York Insurance Company v. De Wolf*. He also referred to the concluding part of *Goodyer St. John v. Bishop of Winchester*.⁽¹⁾ Again, this was not made a point in the Court below.

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(t) 1 Br. Ch
Rep. 286.
(1) 1 Id
Rep. 930.

Talcott. Whatever may be the rule of the Lords, I hope the time may not arrive, when this Court will refuse to correct an error, which it shall be satisfied is a gross one. The common law of England, in 1775, was made the law of this state, by the constitution,^(u) and if this Court have erred in pronouncing that law, they owe it to their oaths and the constitution to correct the decision. This Court have reviewed their decisions. *Yates v. The People*,^(v) was not only questioned on the argument, but partially overruled in *Yates v. Lansing*.^(w) We are told *stare decisis*. Why not apply this rule to the decisions in the English books, which preceded the case of *Anderson v. Jackson*, and which form the law of the land ?

(u) Con. Art
7, s. 13.

(v) 6 John
Rep. 337.

(w) 9 Id. 394

But we propose, not merely, to question that case. We also mean to show that the words of the will would, under the statute, *de donis*, create an estate tail in Medcef Eden, and that the decision in *Anderson v. Jackson*, if correct in the result, will, when referred to its true reason, carry over a conditional fee to Medcef Eden, which, for the same reason, passed, on his death, without issue, to John Eden and Hannah Johnson. What we say, then, will be equally applicable to the question upon the ulterior limitation.

S. Jones, (same side.) The opening has led collaterally to this discussion, and the Court cannot, of course, so fully understand our views, as if we had pursued the argument without interruption. My associate was proceeding to show, that by the English law this would be an estate tail in Joseph Eden, and if not so considered here it must be upon principles peculiar to this state ; and that, taking this to be the law, upon those new principles, it carries over the devise

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as a fee determinable, from Medcef Eden to John Eden and Hannah Johnson.

But this Court have reviewed their own decision. In the late case of *New York Insurance Company v. De Wolf*, they merely said they would look to the question, and unless there were strong reasons for a review, they would not allow it to proceed.

Talcott. In both views, we propose to show that the word *survivor* does not take the phrase out of the general rule.

(x) 2 Caines'
Cas. Err. 217.
2 John. Cas.
451, 8 C.

THE CHANCELLOR. It is true, that in *The New York Insurance Company v. De Wolf*, we did refuse to hear an argument as to one of the points, which had been passed upon by this Court in *Vandenheuvel v. The United Insurance Company*,(x) and I assent to all that has been said, in this case, as to the impropriety of opening decisions plainly and solemnly made. I do not, at present, understand how far the case of *Anderson v. Jackson* may be considered as settling any point in this cause, in the view which counsel propose to take. Occasions may arise when this Court ought to review their decisions. If, on examining *Anderson v. Jackson*, I find that it decides precisely the first point now taken, I shall yield it reluctantly.

Root, President. In *The New York Insurance Company v. De Wolf*, an order was made that I should stop counsel on a particular point ; but here I should be at a loss in directing the counsel how far he should go. I should suppose counsel would not question any point plainly decided in *Anderson v. Jackson*, both in its principle and object. But it is proposed to distinguish the principle upon which that case proceeded, and other and ulterior objects are avowed. In this view of the question, I cannot give directions even upon the maxim *stare decisis*. I have no doubt this Court will determine to abide by their former decision, provided they find they first point settled in *Anderson v. Jackson*.

Talcott. We propose, then, to show that the case of *Anderson v. Jackson* could not have been decided upon the

word *survivor*, and that being independent of that word, both limitations over must be governed by the same rule, that if the first is to take effect the second must go over upon the same principle.

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The case which has been followed by the authorities relied upon against us is that of *Pells v. Brown*,^(y) where the testator devised to "Thomas, his son and his heirs forever, paying to his brother Richard £20 at the age of 21 years; and if Thomas died without issue, *living* William his brother, that then William his brother should have those lands to him, his heirs and assigns forever, paying the said sum, as Thomas should have paid." Thomas died without issue, *living* William, and it was holden that this was a contingent fee to William by way of executory devise. Now it is important to inquire what reliance can be placed upon this case as depending on the word *survivor*. Three years before, in *King v. Rumball*,^(z) a devise to three daughters, *and if they all died without issue*, then over, was holden to create an estate tail. In *Webb v. Hearing*,^(a) a similar decision was made upon words to the same effect with the last. And it is remarkable, that only four years after *Pells v. Brown*, the same Court, composed of three of the same Judges (Doderidge, Houghton & Chamberlain) who decided that case, gave a construction to this word *survivor* with reference to the very effect claimed for it here. I allude to the case of *Chadock v. Cowley*.^(b) The testator devised all his lands in Bradmere to Thomas his son and his heirs forever, and his lands in East Leak to Francis his son and his heirs forever, and then added, "Item. I will that the *survivor* of them shall be heir to the other, if either of them die without issue." And the sole question was whether this devise created an estate tail to Thomas, or only a contingent estate if he died without issue in the life of his brother. And it was holden by all the Court (in the absence of Lea, Ch. J.) that it was an estate tail in Thomas. The case proceeds in this manner: "Although it were objected that the words, *the survivor shall be heir to the other, if he die without issue*, are idle, for it doth not appear that he had any other children; and then, when the one dies without issue, the other is his heir by the law, and so he wills no more than the law appoints; *sed non alloca-*

(y) Cro. Jac
590.

(z) Id. 448.

(a) Id. 415.

(b) Id. 692.

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- sur* ; for *non constat*, but that he might have other children, and that by several venters ; and by the devise he intended to give it to the others by way of devise if he died without issue. *Secondly* ; for the words, *that the survivor shall be heir if he dies without issue*, they seem to be an estate tail. But if the devise had been, *that if he died without issue in the life of the other, or before such an age*, that then it shall remain to the other ; then peradventure it should be a contingent devise in tail, if it should happen and not otherwise : but being *that the survivor shall be heir to the other, if he die without issue*, that, in his intent, is an absolute estate tail immediately, and the remainder limited over. And that here, although the first part of the will gives a fee, the second part corrects it and makes it but an estate tail." The Court thus distinguish as to the word *survivor*, and rely upon this as creating, not preventing an estate tail. Again, in *Hope v. Taylor*,^(c) there was a devise to W. T. and others ; "and if either of the persons before named die without issue lawfully begotten the said legacy shall be equally divided between them that are left alive," (i. e. *survivors*,) and held that W. T.
- ^(c) 1 Burr. 268. took an estate tail ; and the word *survivors* was not even relied upon. In *Roe v. Jeffrey*,^(d) the devise was in fee, and in case the first taker should *depart this life and leave no issue*, then over to three others or the *survivor or survivors* of them. The first taker did not have an estate tail it is true, but this was not on account of the word *survivor*, &c., but
- ^(d) 7 T. R. 585. because the ulterior limitation was of a life estate merely. So in *Thovey et al. v. Bassett et al.*^(e) the devise was to the grand-children in fee, with a limitation to the *survivors* on a dying without issue, &c., but there was no stress laid on the word *survivors*. The remarks of Mr. Justice Story in *Lillibridge v. Adie*,^(f) have a direct application to this case ; and what he says of *Porter v. Bradley*,^(g) and *Roe v. Jeffrey*,^(h) shows that the term *survivor* can have no influence in controlling the generality of the clause. His words are these : "In respect to terms of years and other personal estate, Courts have very much inclined to lay hold of any words to tie up the generality of the expression, *dying without issue*, and confine it to *dying without issue living at the time*
- ^(e) 10 East, 460.
- ^(f) 1 Masson's Rep. 236.
- ^(g) 3 T. R. 143.
- ^(h) 7 T. R. 585.

of the person's decease. But in respect to freeholds, the rule has been rigidly enforced, and rarely broken in upon, unless there were strong circumstances to repel it.(i) The cases of *Porter v. Bradley*(j) and *Roe v. Jeffrey*,(k) have gone a great way, but they turn on distinctions, which though nice, clearly recognize the general rule. In the first case, the devise was "to my son A. and his heirs and assigns, and in case he should happen to die, *leaving no issue behind him*, then to my wife B. during her widowhood, and after her decease or marriage, to my son C. his heirs and assigns forever." Great stress was laid upon the words *leaving no issue behind him*, and upon the circumstance of there being a life estate to B. as confining the contingency to the death of A., and the Court held that A. took a fee, and that the devise over was a good executory devise. In the last case, the devise was "to my grandson A. and his heirs forever, but in case A. should depart this life and leave no issue, then the premises shall return unto my grand-daughters, B., C., D., or the survivor or survivors of them, to be equally divided betwixt them, share and share alike." The Court held that A. took a fee, and that the executory devise over was good, the contingency being confined to a life then *in esse*. Great stress was laid upon the circumstance, that the grand-daughters were then living, and only took estates for life. If the estates over in this last case had been in fee, it seemed admitted that the other words would not have pointed to any other period than an indefinite failure of issue; and consequently to support the limitation over, it must have been held that A. took an estate tail only. In *Wooley v. Norwood*,(l) the devise was to the testator's three nephews, and then to the survivors, on any one of them dying without issue; and the words *survivors* is not made a ground for argument or decision as tending at all to give a character to their estate. And in *Barlow v. Salter*,(m) this word *survivors* was relied upon, but it was expressly determined by the master of the rolls, that it did not vary the case. He says "the word *survivors* as here used, has the same sense as the word *others*, as has been frequently decided."(n) *Roe v. Scott & Smart*,(o) presents precisely the case under consideration.

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(i) Fearn
Ex. Dev. 357,
361. Butler's
ed. 471, 476.
*Croke v. De
Vandes*, 9 Ves.
197. *Dancey
v. Griffiths*, 4
Maule & Selw.
61.

(j) 3 T. R.
143.

(k) 7 T. R.
589.

(l) 2 Marsh.
Rep. 161.

(m) 17 Ves.
479.

(n) Id. 482.
(o) 2 Fearn,
4 ed. 213
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The testator devised certain lands to his son James, to hold to him, his heirs and assigns forever; other lands to his son John, to hold to him and his heirs and assigns forever; and other lands to his son Thomas, and his heirs and assigns forever. He then added, that if either of his three sons should *depart this life without issue of his or their bodies*, then the estate or estates of such sons should go to the *survivors or survivor*; and if all his three sons should happen to die without such issue, then he devised all the said premises to his four daughters and their heirs and assigns forever. The three sons survived the testator and entered, and John died, unmarried, some time after the intestate. Thomas died, leaving a daughter who died without issue; and the question was whether Thomas took in fee or in tail. If in fee the estate would go to the heirs of the daughter; but if in tail to James the then survivor of the three brothers. The author considers the force of the several words *assigns*, *depart this life*, and the words *survivors or survivor*, as apparently carrying an estate to them or him for life only, which he says, furnishes a reasonable ground to confine the contingency, in construction, to a death without issue during the lives in being; which has been held in executory devises to be a reasonable construction, if it falls within the limits of ever so many lives in being at the same time. Yet the words were holden, to carry an estate tail to Thomas, which on the death of the daughter, went over to James. This very case also came under consideration in *Denn v. More*.^(p) and it was decided that the first taker was entitled to an estate tail. This last case was first decided by the Supreme Court; and afterwards on Error to the Governor and Council, the judgment was affirmed.

^(p) 1 Cox. N.
J. Rep. 386.

^(q) Vid.
Hughes v.
Sayer, 1 P.
Wma. 534.

It is true, there has been an English case,^(q) in which a bequest of *personal property* to the *survivor* upon a dying without issue, has been holden limited, by this word *survivor*, to a dying without issue living at the death of the first taker. But there is a distinction between *real* and *personal* property. One Judge has given a restrictive operation to this word, in cases of personal estate;^(r) but there is a difference, even in this case.^(s) In relation to real property, how-

^(r) Id.
^(s) *Barlow*
v. *Salter*, 17
Ves. 479.

ever, there never was any difference in the English cases. Real estate would descend to the heir, and the intent of the testator to control the descent, so as to bestow a personal favor by the limitation over, should be plain beyond a doubt. It is different in regard to goods and chattels. But even in the latter case where there is an intent to provide for the issue indefinitely, the general rule prevails and declares a limitation over void, as dependant upon too remote a contingency. In *Massey v. Hudson*,^(t) the Master of the Rolls says, "If a bequest to A. in case B. shall die without issue be allowed, A.'s representative would be entitled to take at whatever time the issue might fail. It is for that reason that it is held too remote. But if A. is personally to take the legacy, then the presumption is strong that an indefinite failure of issue could not be in the testator's contemplation. *Prima facie*, a bequest over to the *survivor* of two persons, after the death of one without issue, furnishes this presumption; for it will be intended that the *survivor* was meant individually and personally to enjoy the legacy, and not merely to take a vested interest which might or might not be accompanied with actual possession. For if the *survivorship* be necessary only to vest the interest and to render it transmissible, the objection of remoteness is not at all obviated, and the restrictive presumption does not arise. Now the addition of the words, *executors, administrators or assigns*, excludes the presumption that it was a mere personal benefit that was intended for the *survivor*. For though there should be no such failure of issue as could enable him *personally* to take, yet his *representatives* would be entitled to claim in his right whensoever the failure of issue should happen." He proceeds to question the case of *Nicholls v. Skinner*,^(u) as repugnant to every principle upon which it professes to proceed; and that the limitation over after a dying without issue could not have been taken out of the general rule by the words *survivor and his heirs*. And it appears at the close of the opinion, in *Massey v. Hudson*,^(v) that the master of the rolls had compared the report of *Nicholls v. Skinner*, with the registry book and found, contrary to the report, that the bequest over was holden void.

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(t) 2 Merri-
vale, 133.

(u) Prec.
Ch. 528

(v) 2 Merri-
vale, 135, 6

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(w) 5 East,
501.

(x) 10 id.
460.

(y) 6 John.
Rep. 185.

(z) 11 John.
337.

(a) Id. 348.

In the case under consideration, it is agreed on all hands that the devise to Medcef Eden was transmissible to his issue; not restrained with a view to his personal benefit. The devise extends to *all the estate* in the lands. The words of devise to Medcef are as broad as those used, either in *Doe v. Stopford*, (w) *Toovey et al. v. Basset et al.* (x) *Jackson v. Merrill*, (y) or in *Jackson v. Staats*. (z) In the last case, Spencer, J. says, (a) that in *Jackson v. Merrill*, it was decided that "the devise over of *their parts*, which in the hands of the first devisees was considered in fee, necessarily referred to the estate or interest before devised; and that the ulterior devise was clearly intended to be as extensive as the antecedent one." In this case, there was a fee, a transmissible estate, devised to Joseph; this, in the language of Spencer, J. went over to Medcef; and if so, even if we apply the doctrine relative to the limitation of personal estates, it is not taken out of the general rule.

(b) 3 Dy.
330, b. 1 Rol.
Abr. 839, pl.
3.

(c) 2 B. &
P 324.

Clutche's case, (b) when taken in connection with what Ld. Eldon says, in *Doe v. Wetton*, (c) explanatory of the first case, would establish, that the devise to Joseph was a fee tail, and that to Medcef, a fee simple determinable on a definite failure of issue.

Thus the case of *Anderson v. Jackson*, overrules the English common law; but I trust we have shown that this could not have been upon the ground of *survivor*. It was on the ground, that, under our local policy and the statute turning estates tail into fee simple, no man should be construed to mean an estate tail unless he says so in terms; or in other words, that these estates are no longer to be implied.

Then if the devise to Joseph, and the one to Medcef which followed, are to be construed according to *Anderson v. Jackson*, on the death of Medcef without issue, the whole estate went over to the English devisees, John Eden and Hannah Johnson. In determining the case of *Anderson v. Jackson*, the Court cite *Fosdick v. Cornell*, (d) *Jackson v.*

(d) 1 John.
Rep. 440

Blanchan, (e) *Moffatt v. Strong*, (f) and *Jackson v. Staats*, (g) as sustaining the decision ; but all these cases may be reconciled with the English authorities. In *Fosdick v. Cornell*, a new devisee, Mary, not named among the first takers, is introduced in the devise over. *Jackson v. Blanchan* presents the case of a definite failure, within *Right v. Day*. (h) *Moffatt v. Strong*, is a case of personal property ; beside containing the additional provision, *in case either of the first takers should die leaving a wife behind him*. In *Jackson v. Staats*, the case of *Fosdick v. Cornell* is relied upon as deciding the principal point. Spencer, J. says, " what weighed much with the Court in that case exists here ; the devise over was to the surviving devisees in his will, among whom were his daughters to whom he had devised no part of his real estate." In this he was mistaken as to the fact ; but it shows, what he understood to be the law, and the real ground upon which *Fosdick v. Cornell* proceeded. Indeed, until *Anderson v. Jackson*, the consideration of the word *survivor* was never, in any of our decided cases, necessary to restrain the generality of the limitation. There was always enough without this word ; and even in that case, the Court do not entirely rely upon it as the ground of decision. Yates, Senator, who delivered the opinion of the Court, speaks, generally, of the cases. He says, (i) " The testator clearly intended, that if either of his two sons should die without lawful issue, the survivor should take the whole which was devised to both ; and the only question is, whether there is any inflexible, rigid rule of law to wrest the plain and manifest intention of the testator to a purpose altogether different from what he intended. I am unacquainted with any such rule ; nor do I consider the cases cited, when collectively taken, to establish such a position. But if there are any such cases, let it be remarked, that the policy and genius of the British government are, in some respects, opposed to our own ; they encourage and support estates tail, as being important in forming family settlements ; they always lean in favor of the eldest son, as heir at law ; and to oust the devisee, they invariably incline to maintain some of the features of the feudal system,

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J.
Lon.(e) 3 id. 292.
(f) 10 id. 12
(g) 11 id. 337
(h) 16 East,
67.(i) 16 Johns
435.

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which are so intimately connected with the splendor of a monarchy, and the wealth and dignity of an overgrown nobility. On the contrary, it is the policy and genius of our republican institutions, to consider all the children of a parent as placed on an equal footing, and to discountenance an aristocracy of wealth and influence." He notices what Kent, Ch. J. said in *Moffatt v. Strong*; "that the intent of the testator, according to the settled legal construction of terms, was to provide for the surviving sons, on the contingency of either of the sons dying, leaving no issue at his death."

I have noticed this, and the cases which preceded it, sufficiently to show that it did not, and could not go upon the word *survivor*, but rather upon the presumption of a wish in the testator to use words which the law will not defeat. If this be the true principle which fixed the character of the devise to Joseph, we have a right to carry it over, to the devise under which Medcef claimed. The testator acted here in view to the same statute against entails, which governed his ideas of the first devise.

Then, having established the position that these words, *without issue*, simply, and independent of the word *survivor*, mean a definite failure of issue; the words afterwards used to pass the estate over to John Eden and Hannah Johnson, are substantially the same. The testator having used words which amount to a definite failure; when he uses the same words in the same will and in the sentence immediately following, the presumption is that he used them with the same meaning; and this will carry the estate over to the ultimate devisees. Otherwise you must say, that having the same purpose in favor of them, he yet, wilfully and knowingly uses words to defeat his own intent. A fee simple defeasible goes to Joseph, say the Court, and by the devise over all his *estate* (share or part) goes to Medcef. What was this *share or part*—this *estate* which is passed over to Medcef? It is the *fee simple* of Joseph. And yet shall we be told that in the hands of Medcef it was not a fee simple, but a fee tail? Medcef held under the separate devise to him, precisely as Joseph held. Did Medcef's estate, in this share,

cease also on his death? If not, if the whole is to be deemed an estate tail in Medcef, the entire devise over to John Eden and Hannah Johnson becomes inapplicable and must be defeated and destroyed at his birth, contrary to the views of the testator. It is said the whole is converted into an estate tail by the words of the devise. This cannot be. The words in the second devise mean the same thing as those in the first; or the last is nugatory. The words are, "in case of both of their deaths without lawful issue, then I give all the property aforesaid," to the English devisees. This never can apply to one devise in one sense, and to another in a different sense. If so, they never could both die without issue; and the testator is made, absurdly, to say, "I will send the estate over, though I have first provided that it never should go over."

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This rule that the same words used in different parts of the same devise, shall be construed to mean the same thing, is supported by authority. Fearne,^(j) in commenting on the case of *Atkinson v. Hutchinson*,^(k) says, "It is further observable that there was a preceding limitation, upon the death of either of the children, without leaving issue, to the *survivors* of them. Now this, strictly, was not applicable to an indefinite failure of issue, because confined to a *survivor*; and it was but reasonable to give the same words the same construction in the subsequent limitation, which they must bear in a limitation immediately preceding, applied to the same subject." In *Beauclerk v. Dormer*,^(l) Lord Hardwicke says of the same case, "*Atkinson v. Hutchinson* is plainly different from this; though the plaintiff's counsel insist that the last contingency in that case, is expressed as generally as the contingency in the present; and taking it as a single independent sentence, it is an authority; but the whole must be coupled together, and then the words, *if both die without issue*, must be construed in the same manner as the Court construed the former clause." *Sheppard v. Lessingham*,^(m) was a devise of bank stock, the first moiety whereof was limited over, expressly, on a dying without issue at the death of B.; and as to the other moiety, it was bequeathed to the daughter for life, remainder to such child or children of her, as should be living at her death:

^(j) Ex. Dev
367.
^(k) 3 P. Wms
258.

^(l) 2 Atk
312.

^(m) At & L
122.

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(n) Id. 125.

(o) 13 Ves.
476. Vid. id.
484, per Ld.
Chancellor.

and if she should not leave any child, or if all the children die without issue, then to J. S. The daughter had a son born, at the time of making the will. Ld. Hardwicke said, (n) "there is a different penning in the limitation of the last moiety. It is after a dying without issue generally; but I am of opinion the same construction is to be put on these words, as on the words *without leaving issue*, in the other moiety, I consider, in general, that a limitation of a personalty after a dying without issue, is void; but the court will put a construction on those words, (and *Pleydell v. Pleydell*, 1 Wms. 748 is material for that purpose, though the reasoning of the Lord Chancellor is ill reported; for he considered the *dying without issue* as if it had been without such son before described) and support the limitation over if possible." This case of *Sheppard v. Lessingham* was afterwards recognized and acted upon, and governed *Kirkpatrick v. Kirkpatrick*, (o) and in *Right v. Day*, (16 East, 67) where the first devise was properly limited, but the following one was on an indefinite failure of issue, Bayley, J. said, "the words dying without issue, as they occur in this will, do not mean a dying without issue indefinitely," and he held that the last limitation would be valid.

There is no exception to the rule, quoted from Fearn, that the construction of two several successive limitations, though the first be definite and the last indefinite, must be the same. Unless this be so, we have shown that a variety of strange inconsistencies are deducible from the case under consideration; and in England, even without these peculiarities, the rule is the same.

Thus, in either event; whether Joseph's estate was a fee tail and became absolute by our statute changing it into a fee simple; or if *Andersen v. Jackson* be correct, the plaintiff in Error must succeed. In the latter event, judgment can only be for damages and costs; but not for the term. There can be no change of possession.

But the late Ch. Justice, in delivering the opinion of the Court below, avoided the point, whether the last limitation over was or was not dependant on a definite or indefinite failure of Medcef's issue, as unnecessary to be discussed, be-

cause the vesting of the first limitation in possession turned the subsequent one into a vested remainder ; and he cites (p) 2 Saund. 388 b., where Serjeant Williams says, in a note, " With regard to executory devises, it is a rule that wherever one limitation of a devise is taken to be executory, all subsequent limitations must likewise be so taken. However, it seems to be established, that wherever the first limitation vests in possession, those that follow vest in interest at the same time, and cease to be executory and become mere vested remainders, subject to all the incidents of remainders." He refers, says the Ch. Justice, to *Stephens v. Stephens*, (Cas. Temp. Talb. 228,) *Hopkins v. Hopkins*, (1 Atk. 581,) and *Doe v. Fonnereau*, (Doug. 487.) " Cruise, (vol. 6, § 17, tit. 38, ch. s. 26, 28,) and Fearn, (411, 419, 420, 6 ed. 526,) concurs in this opinion, and the adjudged cases fully support the rule as laid down by these learned commentators. The case of *Brownword v. Edwards*, (2 Ves. Sen. 243,) contains the same doctrine. The estate, then, of John Eden and Hannah Johnson, was turned into a remainder when the executory devise took effect in favor of Medcef Eden. The devise to them, then ceasing to be executory, Medcef became seised in fee tail, by necessary implication of law, with remainder expectant in favor of John Eden and Hannah Johnson."

Now, in order to comprehend this, we must understand, in the first place, that at common law, no remainder can be limited after a fee ; and the Court say, " because John Eden and Hannah Johnson's estate must be a remainder, we will turn Medcef's into an estate tail in order to support it." While the first limitation is executory all the subsequent ones must continue so, because all depend on the first. The other rule is, that the subsequent estates are remainders in those cases only where they follow an estate which admits a remainder after it.(q) The authorities cited by the Chief Justice establish this, and nothing more. In *Stephens v. Stephens*, the remainder followed a fee tail. A series of estates in tail male, are limited to the testator's grand-children, and these admit of a remainder. These limitations vested as remainders, and so it would have been if the precedent devise had not been executory, but had vested im-

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(p) 20 John
489.

(q) Fearn
Ex. Dev. 392
in note.

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mediately. The Court will find all the cases cited, to be of the same character. If the succeeding estate be, like the present, a fee, it cannot be whittled down to an estate tail, in order to give effect to a still subsequent estate, as a remainder.

But the Chief Justice turns the estate of Joseph into a fee tail to make it support a remainder. It was once, as he admits, within the case of *Anderson v. Jackson* a fee simple, determinable on a contingency, and accordingly he starts it as a fee simple from Joseph; but when it comes from him to Medcef, it is a fee simple absolute in Medcef under our statute;^(r) and at the same time a fee tail, for the purpose of supporting a remainder over to the brother and sister of the testator. It is more than fish at one time, and flesh at another; it is fish and flesh, at the same time. I am at a loss to perceive how such an absurdity was arrived at, unless upon the principle with which the learned Judge set out, that "we have, fortunately, little experience with regard to estates tail."

Between the years 1782 and 1786 words might be used creating an estate tail; but by the act of 1786 the statute *de donis* was repealed. Estates tail were abolished in terms, (1 Greenleaf's Laws, 205,) and in 1788 a statute passed abolishing and repealing generally all the statute laws of England, which ever had any force in the state, (2 Greenleaf, 116, s. 37.) This will was not made till 1798. Then how could there be an estate tail created by this will which might be turned into a fee simple? How could the Court make an estate tail after the repeal of the statute *de donis*? The *substratum* fails. In all the previous cases, involving this point, the wills were made previous to 1786, like that in *Jackson v. Billinger*.^(s) No such thing as an estate tail was known at the execution of Eden's will. In *Cruger v. Heyward*,^(t) the devise over was after the general words, *dying without issue*, and there was no qualifying clause; yet it was holden that the estate went over, upon the ground that, in South Carolina, there was no statute *de donis*—that the first devisee, therefore, took a fee conditional at the common law, leaving a reversion in the deviser, of which he had a right to dispose.^(u)

^(r) 20 John.
489, 90.

^(s) 18 John.
368.

^(t) 2 Des-
sauss. 94.

^(u) 112.

[THE CHANCELLOR, here expressed his determination to abide by the decision in *Anderson v. Jackson*. He now understood that case, distinctly to fix a construction upon the clause which devises to Joseph Eden; and was prepared to say that it did not carry an estate tail, but a fee, determinable on his death without issue then living.]

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WHEELER, Senator. It appears to me, the ground we took in *The New York Fireman Insurance Company v. De Wolf*, settles the course which we should pursue in this case.

ROOR, President. I think it difficult to say with what force *Anderson v. Jackson* may be brought to bear upon the subsequent clauses in this will, devising over from Medcef; and for this reason, I am opposed to, entirely, excluding that case from the consideration of the Court.]

S. JONES, (same side with the Attorney General,) here referred the Court to several cases :

1. To show that a will must always be construed as it should have been at the testator's death, he cited *Doe v. Fonnereau*, (Doug. 494, n. (1) there, per Ld. Mansfield, in reply to Rooke, arg.) *Bagshaw v. Spencer*, (1 Ves. Sen. 153, per Ld. Hardwicke,) *Evans v. Astley*, (3 Burr. 1581, per Ld. Mansfield,) and *Jackson v. Billinger*, (18 John. 381, per Spencer, Ch. J.)

2. To show that the will of Medcef Eden, the younger, was inoperative as to the premises in question, they being lands of which he was not seised at the time of his death, he cited *Bunker v. Cook*, (Gilb. Dev. 126, 136,) Rob. on Wills, 297, 8, 9, and the cases there cited; *Goodright v. Forrester*, (1 Taunt. 578,) *Roe v. Griffiths*, (4 Burr. 1961,) Bac. Abr. Maintenance (E) Phil. ed. 1813; *Campbell v. Sandys*, (1 Sch. & Lef. 294,) *Nichols v. Nichols*, (Plowd. 485,) 6 Cruise, tit. 38, ch. 3, s. 26, 28, p. 28, 29; Pow. on Dev. 184, 5, Phil. ed. 1822, p. 24, 154; 11 Mod. 128, (per Holt, Ch. J. in *Bunker v. Cook*,) 1 Rep. 153, and *Goodright v. Forrester, et al.* (8 East, 552, 563, 4, &c.)

3. To show that, if the interest of the lessor expired since suit brought, he can recover his damages alone, but not the

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term, he referred the Court to Runn. on Ej. 404; *England v. Slade*, (4 T. R. 682, 683,) Co. Litt. 285, a.; *Adams on Ej.* 306, ed. of 1821, by Mr. Ruggles; *Doe v. Bluck*, (3 Camp. 447,) and *Thrustout v. Grey, et al.* (2 Str. 1056.)

M. Van Buren, for the defendant in Error. For the affirmance of the judgment below, we rely on the following among other grounds:

1. It having been settled in the case of *Anderson v. Jackson*, by the judgment of the Supreme Court affirmed in this Court, that on the death of Joseph Eden, that part of the estate which was devised to him, vested in his brother Medcef, that point cannot now be questioned here; more especially, as it was not made a point, or in any way raised for the consideration of the Supreme Court, but on the contrary was admitted by both parties to be the settled law.

2. That the devise, on the death of Joseph without issue vested in Medcef Eden an estate in fee simple.

3. The devise over to John Eden and Hannah Johnson is inoperative and void.

4. It is not allowed to the plaintiffs in Error to set up such an outstanding title as they claim that of John Eden and Hannah Johnson to be.

5. That the fine with proclamation, set up by the plaintiffs in Error, was void and inoperative; and that if it were valid, its operation was avoided by the entry.

6. That it does not appear, from the verdict, that John Eden and Hannah Johnson are now, or were at the death of Medcef Eden the younger, alive; and after the lapse of more than twenty years, the contrary is to be presumed.

Whether there was a possession, adverse to the claim of Medcef Eden, so as to prevent the operation of his will, cannot be drawn in question here. The demise is not from him alone; but from Wood, also, his assignee. In truth

(v) 8 John. *Frier v. Jackson*, (v) settles this point.
Rep. 495.

Whether we are to have, both the term and damages, or the latter only, depends principally upon the general questions in the cause.

The general questions are among the most dry and intricate in the law. They are, of themselves, intrinsically difficult, and are rendered much more so, in some of their branches, by the mass of comment and refinement in which they are involved. It is important that they should be fully apprehended by the Court; and my object, therefore, shall be plainness and perspicuity. Medcef Eden the elder, his sons, and his brother and sister, are the persons before the Court. Medcef the elder died seised, in 1798; having the same year devised the great bulk of his property, in separate parcels, to his two sons, Joseph and Medcef, their heirs and assigns respectively. He then says, "Item. It is my will, and I do order and appoint, that if either of my said sons should depart this life, without lawful issue, his *share or part* shall go to the survivor; and in case of both of their deaths, without lawful issue, then I give all the property aforesaid to my brother, John Eden, of Loftus, &c., and my sister, Hannah Johnson, of Whitby, &c., and their heirs."

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Dec. 1833.

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EDEN.

Some years ago, Joseph died without issue, and Medcef, the younger, claimed the share devised to his deceased brother, as the *survivor* of that brother. The plaintiffs in Error resisted that claim, on the ground that the devise was void, as being limited on an indefinite failure of issue, a contingency which was too remote in the eye of the law. We said no—that the devise was good—that the testator intended the estate for Medcef in the event which had happened, to wit, a definite failure of issue.

This brings us to the first point of inquiry; whether the devise to Medcef, the younger, being on a definite failure of Joseph's issue, is not good by way of executory devise.

At common law no man could devise, and this continued so till about the middle of the 16th century, when statutes (w) were passed conferring this right. Soon after, questions arose upon its extent, and the Courts were disposed to lean in favor of dispositions by will. At common law, one difficulty in conveyancing was that no fee could be limited after a fee. That law was averse to a perpetuity, on principles of correct policy. It checked commerce and improvement by tying up estates in particular families.(x) Nor could a fee

(w) 32 and 35
H. 8.

(x) 12 Mod
287. 1 Vern
163.

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(y) Id

be limited to vest *in futuro*, unless based on a previous particular estate reaching to the point of its commencement. To remove these difficulties in favor of wills it was declared that a deviser might do either by way of executory devise. This was at first severely litigated, as tending to create a perpetuity ; and hence the discrepancy between some of the earlier cases. But towards the close of the 16th century, the point was settled in favor of these devises, with proper limits to guard against a perpetuity, (y) and has not since been questioned. If the limitation is in such terms, that it must, at all events, take effect within a life or lives in being and 21 years and 9 months afterwards, it is good ; otherwise void. Within this rule an estate could not be limited to one on another's *dying without issue* ; for these words had a technical meaning, at common law, signifying an *indefinite* failure of his issue ; that is, the estate could not go over until his children, and his children's children, &c., to the remotest generation, were dead. To constitute this indefinite failure of issue, his whole family must have been extinct before the estate could go over. Thus an absolute perpetuity might be created. The old alarm arose, which had restrained conveyances at common law. Policy was violated by allowing an undefined latitude to the deviser. But there is a *definite* failure of issue, which is when a man dies without issue living at the time of his death. From the time when the statute of wills passed, to 1620, the question was often up, as to what the words *dying without issue* signified ; that is to say, whether they meant a *definite* or *indefinite* failure of issue. When these words stood alone, it was universally agreed that they meant an *indefinite* failure ; and the devise over depending upon it was void ; and if there is nothing more in this case, to give us the land would be uprooting the law from where it has stood for centuries. If the limitation is to be read simply, "If *Joseph dies without issue*, then to Medcef and his heirs," our claim is gone. But there is more : it goes to the *survivor* of the two sons, and it can go to him only in the event of his *surviving*. Then you are free from the objection that here is an *indefinite* failure of issue, because the devise shows a clear intent that the question of failure should be decided at Joseph's death. On *this word* we rely. and

unless authorities are overturned, this word must preserve us to the end.

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This cause was brought before the Supreme Court, and the questions which it involved, upon the limitations over, were considered of a familiar every day character ; but in *Anderson v. Jackson*, they were, for the first time, brought before this Court. Gentlemen were then heard upon them, in another man's cause depending upon the identical clause now under discussion ; and the decision of the Supreme Court, in our favor, was affirmed, upon the very principle involved in the first point, to wit : that the word *survivor* restrained the generality of the words to *issue living* at the death of Joseph.

The dispute thus being, as we had supposed, settled in our favor, we called for the residue of the property not acted directly upon by the suit of *Anderson v. Jackson*. But our claim was still resisted. We commenced this, with other ejectment suits, for the recovery of that residue. Pending these suits Medcef Eden, the younger, died ; having devised to his wife and her daughters.

In the first place, the old ground is taken, which we had litigated in *Anderson v. Jackson*. The decision there is said to have been erroneous ; and that is the great and only material question in this cause. The decision I am called upon to support, and I proceed to do it with the greatest pleasure, because this court consent to hear me. It is perhaps proper ; as the late Chancellor Kent gave a very long and learned opinion, sustained by a respectable minority, against the majority who gave the judgment. I also owe it as a matter of respect to this Court, to show that its decision is not to be shaken.

To do this, we must briefly review the history of the principle involved in that cause. The point is, simply whether a limitation to the survivor or survivors of two or more persons, on the other or others dying without issue, is *definite* or *indefinite*. This question came before the Supreme Court for the first time in 1806.(x) It was upon a will which contained the following clause : " Further my mind and will is, that if any of my said sons, William, Jacob, Thomas and John,

(x) *Fosdick*
v. *Cornell*, 1
John. Rep
440.

ALBANY,
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v.
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or my daughter Mary, shall happen to die without heirs male of their own bodies that then the lands shall return to the *survivors*, to be equally divided between them." This limitation was after a devise of part of his lands to his son William, and his heirs forever, and other lands to the other sons of the testator and this daughter Elizabeth, in fee simple. With a small material exception, that was precisely this will. The cause was fully discussed. A leader in that discussion, against the estate tail, was one of the gentlemen who oppose me here. Mr. Jones, for the plaintiff, there said, (a) "It is true, that if the devise over was on the *indefinite* failure of issue, the contingency would be too remote to render it an executory devise. (2 Fearne, 4th ed. p. 118.) But a contingency, that if a person die without sons or male issue, would be sufficiently near and probable; *and in this case the event must happen within the lives of some or one of the devisees, as the remainder is to the survivors and not their heirs.*" The Court decided that the limitation over was valid as being on a *definite* failure of issue; and their reasoning is based on *Hughes v. Sayer*, (b) that the immediate limitation over was to the *surviving devisee*. Mr. Justice Thompson, who delivered the opinion of the Court, entered very fully into the English cases, as he ought, it being a question raised here for the first time; and he finally, with the unanimous concurrence of the Court, decides the very same question we are now considering. That decision was submitted to. No writ of error was brought.

(a) Id. 442.

(b) 1 P. Wms.
534.

(c) *Jackson*
v. *Blanshan*, 3
John Rep.
292.

In 1808, (c) the question is again presented. Here, as in England after *Pells v. Brown*, the question is brought up, and the proposition again contested. The cause was argued, and the opinion of the Court was delivered by Kent, Ch. J. who decided that the word *survivor* qualified the general words.

(d) *Moffat v.*
Strong, 10 id.
12.

In 1813, (d) the question is again discussed; and Kent, Ch. J. again delivers the opinion of the Court in favor of the same construction.

(e) *Jackson*
v. *Statts*, 11
Id. 337.

But opposition was not yet subdued. In 1814, (e) the question was repeated, distinctly; and Spencer, J. delivered the opinion. He says, "I believe none of us have ever doubted the

correctness of the decision in *Fosdick v. Cornell*; and it would be a waste of time to review the authorities there cited."

ALBANY,
Dec. 1828.

Wilkes
v.
Lear.

In 1816, *our rights* became important; and in the course of vindicating these rights we were brought into this Court, in 1818. We had then before us 13 years of unbroken adjudication, in affirmance of our rights, upon which we reposed with the greatest confidence. We were not deceived; for, in *Anderson v. Jackson*, this Court gave sanction to our claim upon the point now in controversy.

But, we shall be told, the decision in *Anderson v. Jackson* was not unanimous. True, it was not so—a fact which we looked upon as somewhat strange; for we had supposed the principle of that case as well settled as any one in the law. And it was peculiarly unfortunate that the opposition should come from that very quarter in which we had reposed our rights. Yes, the late Chief Justice (then Chancellor) Kent, gives an opinion, which occupies nearly 30 pages in the report, (f) to show that the decision of the Supreme Court had been grossly erroneous!

(f) 16 John
397 to 424.

How stood the point, upon authority, on coming into this Court? The parties came here, to litigate upon a principle so fully and plainly established in the Supreme Court, that the decision of the cause there, though involving a large amount of property, was not deemed worth reporting. You saw that principle concurred in by Kent, Ch. J., Thompson, Ch. J., and Spencer, Van Ness, Yates and Platt, Justices; after a series of discussion almost unparalleled in the history of any principle in our law. You saw the same questions arising, and the same principle established in neighboring states. From every source, opposition was hushed; not only with men of books, but in the common walks of life. You knew that thousands of wills had been made upon that very principle, and that, if you unsettled the rule, you opened Pandora's box. You knew it more important that the *law should be settled*, than *how* it should be settled. You secured to us a principle which had been established in the mind of every man for a long time; and you were right, for the contrary would have been incalculably mischievous.

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But the propriety of your course was questioned by a long opinion from the late Chancellor, professing to show this series of adjudications, by the most enlightened tribunals in the state, legal heresy. It is my duty to examine that opinion. I confess I do this with reluctance. It was this, and not any fears from its effect, which led me to join in the preliminary objection, made by my associate, against this point being heard. In this we were overruled. The opinion lies in our way, and we must travel over it.

With deference; it is an opinion inconclusive in all its parts; and of the 26 cases upon which it is founded, there is but one which gives *color* to it. It contains an apology, and this was obviously right. An apology was due, for attempting to overturn a rule, after having suffered our citizens to go on, for years, settling their property under it; a rule, too, which the learned Chancellor himself, more than any other Judge had contributed to establish. "But if," (says Chancellor Kent,) "the decisions have been as settled and uniform as I have stated, it may be asked, how came the Supreme Court to make such a decision, as that now under review? I answer, that the present case was decided without going into any discussion of the merits, and by a reference merely to one or two former cases in the Supreme Court, all of which rested upon the case of *Fosdick v. Cornell*, (1 John. Rep. 440,) decided by that court in August, 1806. I was at that time Chief Justice of the Supreme Court; and though I did not give the opinion, I will not shelter myself under that silence. I am free to say, that I partook of its error. But I should be unworthy of public confidence, if, with more experience and more examination, having detected myself in an error, I should now be ashamed to confess it. I discovered, years ago, that the case of *Fosdick v. Cornell*, was decided upon mistaken grounds. The Court, however, have this apology for themselves, that without much examination, and without looking, as they ought to have done, deeply into the subject, they were led astray out of the beaten track, by such a distinguished leader as Lord Kenyon. The cases of *Porter v. Bradley*, (3 Term Rep. 143,) and of *Roe v. Jeffrey*, (7 Term Rep. 589,) were the blind guides

that misled them. I say this, confidently; for the Court do nothing more, in the whole opinion, than repeat what Lord Kenyon had spoken." In the decision of 1813,^(g) the same Chancellor (then Ch. Justice Kent) says, "if the limitation rested solely on the words *dying without issue*, we have seen that it would fail; but the will proceeds, and gives the part of the son dying without issue, to the *survivors*, except the portion which was to go to the wife. The term *survivors* will be found to rescue the limitation from the operation of the general principle, and to bring it within the reach of other cases which have adjudged that expression to be the cause of a different construction; and, for the reason that it could not have been intended that the *survivor* was to take only after an *indefinite* failure of issue, as that event might not happen until long after the death of all the survivors." This goes, in words and letters, to the precise point now under consideration.

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^(g) 10 John.
16.

But in the decision of this and the previous cases, the authorities were not fully looked into. Was this so? *Fosdick v. Cornell*, was argued by as able counsel as any in the state. The report shows the ability with which it was examined. Thompson, J. goes into all the English decisions. To *Jackson v. Blanshan*, *Jackson v. Staats* and *Moffat v. Strong*, similar remarks may be applied. In all these cases the subject is gone over, not only by the ablest counsel, but by the ablest Judges, with the same result; and is it to be tolerated that this result shall now be questioned? Is any one to be tolerated in telling us that all these decisions *were lightly considered*? I wish the expression were not in the book.

But, "Lord Kenyon and the cases of *Porter v. Bradley* and *Roe v. Jeffrey*, were the blind guides which misled them." No. If you look into the opinions of the then Ch. Justice, Kent, you will see how fully he considers them. The leading case is *Pells v. Brown*.^(h) True, this case was once questioned; but for more than 200 years it has not even been doubted, in any book of any country. It was treated by Lord Kenyon, by our Supreme Court, and by other Courts as the Magna Charta of the law on this question. But Chancellor Kent dissents from it. With the ex-

^(h) C. v. Jac
590.

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ception of two or three nearly simultaneous cases, it never was questioned. Now we are to be told that Lord Kenyon was deceived and misled in his eulogium. There is not one case questioning that, which has not been overruled again and again; and no lawyer would now be heard to question it, in Westminster Hall.

It was at least to have been expected from the late Chancellor that he would have shed a new ray of light upon the question, putting doubt at defiance. But, I repeat it; out of 26 cases relied upon by him, *Chadock v. Cowley*,⁽ⁱ⁾ alone, is against us. What is the point of inquiry? Is there something in this limitation which restrains the general words to a definite failure of issue? We say *survivor* does.

⁽ⁱ⁾ Cro. Jac.
695.

^(j) 35 Ed. 3
pl. 14.

^(k) Cro. Jac.
448.

^(l) T. Raym.
452.

^(m) 1 P.
Wms. 663.

⁽ⁿ⁾ Wille's
Rep. 1.

^(o) 1 Burr.
268.

^(p) Doug. 487.

^(q) 5 T. R.
335.

^(r) 7 T. R.
276.

^(s) 9 East,
382.

The book of Assise^(j) is first quoted by the Chancellor. But nothing was pretended in that case, to qualify the limitation. It was not to the *survivor*. In *King v. Rumball*,^(k) the limitation was not to the *survivor*. *Pells v. Brown* is the next. *Holmes v. Meynel*,^(l) was in other respects much like the present case, but this word *survivor* was omitted, in the limitation over. *Forth v. Chapman*^(m) was a question as to personal property bequeathed upon the general words; and these, alone, were limited to a definite failure in such a case. In *Brice v. Smith*,⁽ⁿ⁾ the word *survivor* does not occur; and *Hope v. Taylor*^(o) was not a question as to a devise over. The first taker had issue which clearly gave an estate tail. In *Doe v. Fonnereau*^(p) Ld. Mansfield asked Serjeant Hill whether he had ever been able to find any case of real property, where the Court, on the words *in default of such issue*, had implied a restriction to *issue living at the death of the father*; and he said he had not met with any. And it is very true that no such case can be found. We do not contend for a limitation of these words, by mere implication arising from the words themselves. *Denn v. Slater*,^(q) the word *survivor* is not used, nor was there any provision that B. should die without issue in the life of C. So of *Doe v. Rivers*,^(r) so of *Doe v. Ellis*,^(s) but this case pre-supposes that the general words may be restrained by im-

plication from other parts of the will. *Tenny v. Agar*,^(t) goes upon the general, unrestrained words. The devise over, was not to the *survivor*, but to a cousin who had not been before introduced. The Chancellor's cases do not apply. It is singular that not one of them can even be distorted into an application to the point in question. *Kirkpatrick v. Kilpatrick*,^(u) the Chancellor admits is against him ; and in *Barlow v. Slater*,^(v) there were no restrictive words. The limitation over to one of the nieces for life, in that case, does not necessarily imply an intent that there should be a definite failure. This was the only point decided there. In *Romilly v. James*,⁽¹⁾ also, there were no words of restraint ; and this a sufficient answer.

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(t) 12 East,
253.

(u) 13 Ves
476.

(v) 17 Ves
479.

(1) 6 Taunt
263.

"I have thus," (says the Chancellor) "continued the history of the English decisions, from the time that we abolished estates tail, down to the present moment ; and it must have been perceived that there is one undisturbed current of authority, as well since, as before our statute, declaring and establishing that such words as are used in the will of Medcef Eden, the elder, do create an estate tail ; that they do mean an indefinite failure of issue."

Chadwick v. Cowley, decided about 200 years ago, I admit may be a case against us ; but if it does interfere with *Pells v. Brown* it has gone to the shades. The latter case has been conceded to be the law, till questioned by Chancellor Kent in this Court. If, in a few instances about the time when it was decided, it was questioned, it has outrode the storm. Even *Chadwick v. Cowley* is reducible to questions peculiar to itself, and was capable of decision without interfering with *Pells v. Brown*. Intent is the polar star which guides in the construction of wills. Little, indefinable circumstances will sometimes indicate the intent and conflict with general rules. This consideration has led a learned Judge in Pennsylvania to say, that unless authorities on the construction of wills are in point upon every particular, they cannot govern.^(w) The father had disinherited his eldest son ; and the Court leaned in favor of a construction which would defeat his will. And this is

(w) Pea
Smith, J. 3
Yeates' Rep
236.

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the key to the case of *Chadwick v. Cowley*. The Court say, (x) "For the words *that the survivor shall be heir to the other if he dies without issue*, they seem to be an estate tail. But if the devise had been that if *he died without issue in the life of the other, or before such an age*, that then it shall remain to the other ; then peradventure it should be a contingent devise in tail if it should happen, and not otherwise ; but being, *that the survivor shall be heir to the other, if he die without issue*, that in his intent is an absolute estate tail immediately, and remainder limited over." And that case may, even now, be law with the qualification which the Court give to it, without impugning *Pells v. Brown*.

(y) 2 Mass.
Rep. 56.

(z) Id. 554.

(a) 5 Id. 500.

(b) 3 Yeates'
Penn. Rep.
205.

(c) 1 Wash.
Virg. Rep. 71.

(d) 2 Munf.
Virg. Rep
479.

(e) Cam. &
Norw. N. C.
Rep. 202.

(f) 1 Bay's
N. C. Rep.
80.

The Chancellor next proceeds to review some of the American cases. That of *Richardson v. Noyes*, (y) is in our favor. The words *survivor* or *survivors* were used to designate the second takers ; and these, among other words, are relied on for the very purpose that we urge them here ; and the limitation over was holden valid. *Ray v. Enslin*, (z) is inapplicable, but the Court recognize the doctrine, in the abstract, which we contend for. *Idc v. Idc*, (a) does not touch the point ; but the Chancellor says, "*Hauer v. Shitz*, (b) turned upon the construction of peculiar provisions in a will, which are not at all analogous ;" but the truth is, we could not have found a stronger case in our favor. The word *survivor* is expressly relied upon by the Court. *Hunters v. Haynes*, (c) turned upon the general words alone, had no application for the Chancellor's purpose, but is in point against the premises passing to the English devisees. The same remark applies to *Royall v. Eppes*, (d) and *Denn, ex dem. Sutton and wife, v. Wood*. (e) "In *Keating v. Reynolds*, (f) (says the Chancellor,) "it was admitted, that the general words, *that if either should die without lawful heirs of their bodies*, appeared to look to an indefinite failure of issue, but they held that the subsequent words"—What words ? These words says the Chancellor, *without lawful heirs of their bodies to live*, "controlled the general words, and made a good limitation over by way of executory devise." This was not so. The bequest over was "equally to be divided between the *survivors*."

This word *survivors* is relied upon by the Court as restraining the general words. "This term *survivor*," say the Court, "is a term of much import here. It carries with it the idea of the longest liver, provided the other sister should leave no children behind her; that is, none living at the time of her death." The case is directly against the Chancellor, and in point for us. The same remarks apply to *Jones v. Rice.*(g)

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(g) 3 Desaux
165.

Now then, how stands the question? Does not the word *survivor*, rescue this case from the general principle? Is it not clearly so? This Court, then, decided right in *Anderson v. Jackson*. For four years the law has been fixed by a Court of *dernier resort*. Men have gone to their graves after having settled their estates upon the principles which you have promulgated. If erroneous, it is because the decision was made by men. You ought not to affirm it so much because it was right, as because it was law. There is hardly a will settling real estate, which does not contain the disposition in question. It is the most common case in a devise. You have not the moral power to change your ground; because it is not right. Who can know what the law of this state is, unless your decision is final? Shall we look into your decisions under the idea that they are to be overturned by a new set of men, who shall come here tomorrow? A change of decision with a change of men, would be a less evil in the Supreme Court of this state, or of the United States, because from the tenure of the Judges' office, frequent changes are not to be looked for. This Court may change once in four years. Are we, barely, enabled to say "these words meant a definite failure of issue yesterday: but whether this will be law next year, I will tell you after election?" The law of discretion, with the best of men and the best of Judges, is more or less the creature of prejudice or passion. *Your decisions* should be as stable as the constitution: They should be so in order that the suitor may, at least, see one spot where there is an end of uncertainty.

2. The simple devise over from Joseph to Medcef, under the word *survivor*, would have given the latter a life estate only. But it is just as well settled as that two and two

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(h) 1 Green-
leaf's ed. of
Laws, 205, n.
1.

make four, that a devise over, as here, to John Eden and Hannah Johnson on both sons' dying without issue generally, makes, by implication, an estate tail out of the preceding estate. Here, then, would have been an estate tail in Medcef Eden, had it not been for the statute of 1786.^(h) This act declares, "that all estates tail shall be and hereby are abolished; and that in all cases where any person or persons now is, or are, or if the act hereinafter mentioned and repealed (act of 1782,) had not been passed, would now be seised in fee tail, of any lands, tenements or hereditaments, by virtue of any devise, gift, grant or other conveyance, heretofore made, or hereafter to be made, or by any other means whatsoever, such person and persons; instead of becoming seised thereof in fee tail, shall be deemed and adjudged to be seised thereof in fee simple absolute." The legislature thus lay down the rule, which governs this case, in terms. The estate to Medcef *would have been* in fee tail if the statute had not been passed. Having passed, it is transmuted into a fee simple.

Here we are met with this difficulty; that as the statute *de donis* was repealed before the will was made, no estate tail could exist; and, therefore, the statute does not operate upon this will. But the answer is very simple and obvious. At common law, a fee conditional to A. and certain heirs became absolute on the birth of heirs. This was put down at a very early period by the statute *de donis*, which it is said was repealed here in 1786. But this is a mistake. The statute *de donis* was not repealed; but its operation was changed; and the estates created or to be created under it are construed into a fee simple. Otherwise, we are thrown back to the old fee conditional. No such thing was intended. The legislature of this state in 1788, repealed, as mentioned on the other side, all the statutes of England, knowing that the statute *de donis* had been re-enacted by this state in a modified form.⁽ⁱ⁾

(i) Vid. *Smith*
v. *Chapman*,
1 Hen. &
Munf. 300, per
Roane, J., and
Eldridge v.
Fisher, id.
559.

3. The plaintiffs in error do not stand in a situation to avail themselves of the devise over to John Eden and Hannah Johnson, even supposing it to be operative. Claiming adversely to the original source of title, they have no business with the right of third persons, who must rely for

that right upon the will, in defiance of which our antagonists hold on upon this property.

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But the limitation was destroyed by the statute of fee simple. It is singular that after struggling for years to show, that we were cut of by the general words—that a limitation to us as *survivor* could not save us—gentlemen should now contend, that even without this word, or any other qualifying circumstance, the estate should go over to collateral relations of the testator. Our answer is, that the devise over to them is void. Gentlemen, themselves, have shown it. All the cases cited show it. *Jackson v. Billinger*, (j) decides the very point. Such a limitation was overruled in that case for want of the qualifying word *survivor*. If the rule is to be altered, the legislature must do it. You must administer the law as you find it.

(j) 18 John
368.

But it is said, that the devise over to John Eden and Hannah Johnson, being in the immediate neighborhood of the first limitation over, and following this, is to be taken as part of the same clause; and, as such, it is controlled by the word *survivor*, in common with the first part. Our answer is, that it cannot be taken as a part of the same clause, but is plainly and substantially distinct, not only in fact but within the reasonable intention of the testator. The subject matter is different. This is a devise of the whole. The first was only of a part. The ultimate devisees stand in a different relation to the testator. The former were sons; the latter a brother and sister. The feelings which governed the deviser were different in the two cases. Nothing is more rational than that before he would take the estate away from his lineal descendants, they should be finally exhausted; and to provide for this the words of the condition must have been used in their largest sense, which imports an *indefinite* failure.

The word *then*, in this devise, will not operate to restrict the meaning. (k)

But the reasoning on the other side overturns this claim. The testator uses words having a legal and fixed meaning. Their contiguity to the previous words shows that this was intentionally so. But whether intentionally or otherwise

(k) Harg
Tracts, 523,
arguendo.
Beauclerk v
Dormer, 2 Atk
311.

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(l) *Couden*
v. *Clerk*, Hob.
33.

(m) 2 *Ves*
Sen. 646.
(n) *Id.* p.
655.

(o) *Atkinson*
v. *Hutchinson*,
3 P. Wms.
258. *Beauclerk*
v. *Dormer*, 2
Atk 312.
Sheppard v.
Lessingham,
Ambl. 122.
Kirkpatrick v.
Kilpatrick, 13
Ves. 475.

(p) *Harg. L.*
T. 523.

(q) *Ex. Dev.*
361.

(r) *In Forth*
v. *Chapman*, 1
P. Wms. 663.

(s) *In Beau-*
clerk v. *Dor-*
mer, 2 Atk.
308.

(t) 1 *Ves.*
Sen. 70

makes no difference. Suppose a devise of Black Acre to A. and his heirs, and of White Acre to B., without adding *his heirs*; and admit that these last words are omitted accidentally; would the Court dare to say that both devises are in fee? They might as well repeal the statute of wills. According to the case from Hobart, (l) the Court will adopt the technical meaning, because these are no words indicating a different intent. Ld. Hardwicke, in *Garth v. Baldwin*, (m) refers to the words of the marginal note to Hobart, which, he says, (n) were known to be his words and in his emphatic style; and following him, remarks; "I am not in a Court of Equity to overrule the legal construction of the limitation, unless the intent of the testator or author of the trust, appears by declaration plain; (1) that is, not saying it in so many words, but plain expression or necessary implication of his intent, which is the same thing." Is the mere location of the words in question, to change their legal and palpable intention?

There are a few cases cited on the other side to this point. (o) *Atkinson v. Hutchinson* was mis-reported; (p) but there is this general answer to them all. They relate to personal property, the rule in relation to which is different, on the head we are considering. The presumption need not be so strong as to carry over a bequest of personal property as a devise of real estate. You cannot entail personalty, and the Courts will seize upon almost any ground, however slight, to restrain the general expression. This distinction may be seen in *Fearne*. (q) In 1720, (r) both real and personal estate, were devised over in the same clause, after an indefinite failure of issue slightly qualified, and the clause was holden void as to the real, but good as to the personal property. In 1742, (s) Ld. Hardwicke says, that case was not decided upon a distinction between real and personal property, and it is indeed difficult to tell where the Courts have left this question in relation to the latter. In *Sperling v. Toll*, (t) the

(1) Hobart's marginal note (Hob. 33) is, "No man shall show me a case in law, where, by purchase, by devise to an heir, any may take that is not heir indeed, without declaration plain."

Master of the Rolls, again, glances at this distinction. This was in 1747. But as to real estate, the rule has never been disturbed ; and the ultimate devise over is unquestionably void. The reasoning of the Master of the Rolls in *Sperling v. Toll*, is directly applicable. That was a devise to three nephews during their respective lives, as tenants in common ; but if either died without issue living at his death, his part to go to the survivors, then over to 10 others. Two of the nephews died in the testatrix's lifetime, and the survivor left a son, who claimed the whole estate against the devisees over, on the ground of intent that nothing should go to the latter, till a failure of issue of all the nephews ; but the Master of the Rolls speaks of it in this manner : " It is said, the intent was, that while there was issue of the three nephews, it should not go over ; and that being executory, it should be so directed. The Court will always go as far as possible to support the intent ; but that intent must appear from the words of the will. There are few cases, where evidence of the intent will be allowed out of the words. It only will where there is a doubt to whom the residue is given, or for ascertaining the nature of the legacy or the person of the legatee. If, then, the Court is so very cautious where there is evidence to prove the intent, much more ought it to be so, where that evidence arises only from the surmise of counsel or of the party. The Court is to carry the will into execution ; not to make one for the party, or to give that construction which the Court should think most proper. If this matter was laid before the testatrix, she might think it reasonable, that it should not go over, while there was issue ; and it might be very proper : but that does not appear from the words ; rather the contrary. The plain construction carries it after the death of each respectively : and not to give a survivorship on the death of one without issue ; for it is given in common, and *survivorship* was in the contemplation of the testatrix, as appears from her directing a survivorship for life ; and having omitted it in the direction of the inheritance, it is reasonable to suppose that she did not intend it." The amount of these remarks is, that she had no survivorship in her eye, in the ultimate devise ; and her

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intention cannot be disregarded. Now can we extend the force of the term *survivor* to John Eden and Hannah Johnson when the *word* is not there?

That part of the Chief Justice's opinion has been assailed, which declares the limitation over to John Eden and Hannah Johnson to have been changed into a vested remainder on the previous limitation to Medcef becoming vested in possession; and we are told that there can in no case be a remainder where the previous estate is a fee simple, or will not admit of a remainder after it. True, when you have a remainder, you don't want an executory devise; nor can you have one. The office of an executory devise, is to carry over an estate, in those cases, only, where a remainder cannot do it: and wherever a limitation can have effect as a remainder it supersedes this office.^(v) Now this devise over from Joseph to Medcef was not, in terms, either a fee simple or a fee tail. It would have been a mere estate for life, had not the words of limitation to John Eden and Hannah Johnson enlarged it into a fee tail,^(w) which admits of a vested remainder after it.^(x) Then here was a fee tail vested in Medcef, and what before followed it as an executory devise now followed as a vested remainder; or in the language of the Chief Justice, "The estate, then, of John Eden and Hannah Johnson was turned into a remainder, when the executory devise took effect in favor of Medcef Eden. The devise to them then ceasing to be executory, Medcef became seised in fee tail by necessary implication of law, with a remainder expectant in favor of John Eden and Hannah Johnson." This was the state and shape of the limitations under the common law, and the statute *de donis*, which, we have seen, still exists for the purpose of bringing about this state of things. It is enough that the right of Medcef Eden would have been an estate tail, previous to the statute, (1 N. R. L. 52.) It is then taken hold of by this statute and transmuted into a fee simple, as I have formerly shown. At common law, it might, as the Chief Justice remarks, have been destroyed, or made absolute in Medcef by a fine or recovery; in place of which our statute of fee simple steps in, and reaches this object without that ceremony.

^(v) 2 Fearn, 4 ed. 1, 2, 3, 17 *Luddington v. Kime*, 1 Ld. Raym. 203. *Ives v. Legge*, 2 T. R. 488, 9, n. a.

^(w) *Ives v. Legge*, 3 T. R. 488, n. a.

^(x) 2 Woodson's Lec. 181. 1 Ld. Raym. 209. Lit. Rep. 347. 3 T. R. 488, 9, n. a.

Craig v. Stacey(1) coincides with the Supreme Court, and decides, in terms, that when an executory devise becomes vested in possession, the limitations depending upon it change their nature and become vested remainders.

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A. Burr, (same side,) said, he should add but little on the three first points of the defence. The ability with which all the points had been examined by his associate, forbade his saying much in relation to either. He regretted that the decision in *Anderson v. Jackson* should be opened. He feared that even the stand then taken by the minority against that decision might with some of them have been owing to Mr. Eden's unfortunate selection of one of his counsel; but he was happy in the belief that he had nothing like prejudice or feeling to encounter in this Court.

(1) Irish
Term Rep.
249.

On Joseph's death, the case of *Anderson v. Jackson* carried all the estate devised to him, over to his brother Medceff. That case, however, merely settled the *point*; it did not act upon *all the land*; and instead of abiding that result, and surrendering the residue peaceably, the possessors determined that we should fight them in detail.

It is the disposition of man to hold property, during his life, above control; but to shackle it forever afterwards. Having children, he will give it to them for life, and confining it to his lineal descendants as long as possible, then over. But the law will not allow you to limit on an event beyond a life or lives in being and 21 years and 9 months afterwards, for fear of a perpetuity. This is a worse evil than an *entail*, for the latter may be docked by a fine or recovery. This remedy will never reach an executory devise. Once fix a principle which shall carry over this estate to John Eden and Hannah Johnson, and you establish an entail which no power can cut off. The contingency upon which it turns, is too remote. You will not allow the limitation, because there is no limitation to it. It was given to the sons and their heirs, and it was his obvious intent that their issue or descendants should enjoy to a period indefinitely remote. Suppose they had died immediately after the testator, leaving issue, (which latter is always a

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probable event in this kind of limitations,) it was his intent to carry it to the issue, their children and children's children, till they should fail; thus confining it in the family, and shackling it against the freedom of alienation, for ages. The time when it should pass over to the ultimate devisees, or their heirs, was undefined, and the fee simple of the estate might have been in abeyance for a long time, because it could have no absolute owner. No one could purchase it. This is the evil intended to be reached by *Jackson v.*

(y) 18 John.
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Billinger.(y)

The plaintiffs in Error repose themselves, entirely, upon the further question, growing out of Medcef Eden's death; and they say it is only in reference to this that they have reviewed *Anderson v. Jackson*. They say, "True, we have no title; but John Eden and Hannah Johnson of England have. They are the owners and we claim to hold against all the world except them." But what is the reason of this rule? It is that the possessors should be subjected to damages and costs but once; and that rule is satisfied in this case. They would have been shielded by surrendering to Medcef Eden and paying his costs and damages for the time during which they admit his estate to have continued. They purchased Joseph Eden's life estate which expired many years ago. The title of John Eden and Hannah Johnson, if they have any, arose only in 1819, and had the plaintiffs in Error surrendered the whole land then, as in duty bound to do, they could not have been subjected to any further action at the suit of the English claimants. They attempt to avail themselves of the rule, in their own wrong. It is their fault if suits are to be multiplied upon them.

(x) *Knox et al. v. Jenks*, 7 Mass. Rep. 488.

(a) *Nase v. Peck*, 3 John. Cas. 128.
Green v. Lister et al. 8 Cranch, 250, per Cur. as to the 8th question.

There are various principles upon which this cause must be decided against them, even conceding the title which they set up in the English devisees. In the first place, to avail themselves of a title in third persons, they must show themselves connected with that title.(z) The question is, who has the better title between these parties? This is a familiar principle in the writ of right.(a) An ejectment being a mere substitute for the writ of right it would be an absurdity that on a special verdict, in that action, the rule should be dif-

ferent ; and it is really the same in both. (b) *Jackson v. Davenport* (c) does not form a rule for this case ; because the defendant not only showed that the life estate upon which the plaintiff sought to recover had expired, but he went further and showed a title to the reversion in himself ; (d) and the opinion of Ld. Kenyon, in *England v. Slade*, (e) cited on the other side, has been overruled both in England and this country. It is inconsistent with *Jackson v. McCleod*, (f) decided by the Supreme Court of this state.

Again : the plaintiffs in Error entered under an estate in privity with the successive estates of Medcef Eden, and John Eden and Hannah Johnson, to whom, according to their own ground, the reversion has successively passed. On the expiration of Joseph Eden's life estate, which they purchased, they were the tenants of Medcef Eden, and are estopped from questioning his title, although it may have expired. They must surrender the possession, and then the rights of third persons may be litigated. They have no right to set them up, in this form. They come directly within the principle of *Jackson v. Steward*, (g) *The same v. McCleod*, (h) and *Jackson v. Ayers*, (14 John. 224.) They held in trust for Medcef after his brother's death ; and he may call upon them at all events to surrender the trust. That they had no more than Joseph's life estate, was expressly decided by the Court below, and has not yet been questioned here. They do not pretend to hold under the authority or grant of the English devisees. The lease to Lion was not a fiction, as is usual in ejectments. It was an actual lease for 15 years, executed on the premises when entry was made to avoid the fine. This is a good and subsisting title or interest against all the world except the reversioners. The lessee has a right to his possession till disturbed by those having the inheritance. He was rightfully in possession under the title of the lessors ; and this prior rightful possession cannot be questioned by the plaintiffs in Error, who are no more than mere strangers to the reversioners, beside being shackled by an estoppel arising from their privity with the lessors of the plaintiff. None but the reversioners can be heard. Till avoided by them,

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(b) 3 Wheat.
224, n. (a)
Doe v. Staple,
2 T. R. 696,
per Ld. Ken-
yon, Ch. J.

(c) 18 John.
295.

(d) Id. 302,
per Spenser,
C. J.

(e) 4 T. R.
682, 3.

(f) 12 John.
182.

(g) 6 John.
Rep. 34.

(h) 12 Id.
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(i) 9 H. 6,
43, Br. tit. A-
vowry, 123.
Vaughn, 46.
(j) Vol. 4,
Phil. ed. p. 16,
&c.

(k) 9 H. 6,
43. Br. tit.
Avowry, 123.
Bac. Abr.
Leases, &c..
(C.) 1, 4 vol.
Phil. ed. p. 17.
Dixon v. Har-
rison, Vaughn,
46, states this
case.

(l) 1 R. L.
113. This is
now five years.

(m) 6 East,
85.

(n) 1 R. L.
N. Y. 103.

(o) 1 R. L.
113.

the lease to Lion remains good. It is Medcef Eden's lease, and he and his heirs might avow upon a distress for rent under it.(i) It was not void, but merely voidable by the act of the reversioners, and might have been affirmed by their act. A variety of cases to this effect are collected in Bar, Ab. Leases and Terms for years (D).(j) The English Courts refuse to act upon the rights of third persons, when they are not before the Court. A husband, during coverture, gives a lease of his wife's land; if the wife dies without issue by him, the husband's title is gone, but no one except the reversioner can avoid the lease. The lessee cannot do it, because the lease was drawn out of the *seisin* of the wife.(k) Lion, the lessee, holds for the next person in interest after his lessor. Thus the relations in which the plaintiffs in Error stand, forbid this defence.

But it is said this is a limitation to Joseph Eden and Hannah Johnson, upon the condition that Medcef should die without issue in their lifetime. To arrive at this, in positive violence to all meaning, you are asked to misplace the word *survivor* in the sentence, to put this word in, where it was purposely omitted. Having gone thus far, and said that the ultimate devisees were entitled *as survivors*; you are then asked to go a still greater length of absurdity by saying they are alive—that they did survive—and thus bring them within the terms you have manufactured; and this too, without one particle of proof that they have ever been heard of since the year 1798. They were alive, it seems, when the will of Medcef Eden, the elder, was made, and this is the last we hear of them. You know nothing that they survived. One not heard of in 7 years shall be presumed dead, in analogy to the statute of bigamy.(l) In *Doe v. Jesson*,(m) Ld. Ellenborough said, "As to the period when the brother might be supposed to have died, according to the statutes (19 Car. 2, c. 5) with respect to leases dependent on lives;(n) and also according to the statute of bigamy, (1 Jac. 1, c. 11,)(o) the presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of 7 years from the time when they were last known to be living. Therefore, in the absence of all other evidence, to show that he was living at a later period,

there was fair ground for the jury to presume that he was dead at the end of 7 years from the time when he went to sea on his second voyage, which seems to be the last account of him." Why then is survivorship not on the record? It lay with the other side to show this fact to bring the case within their own terms. Without this, their limitation fails for want of lives to support it. Admit that the limitation vested in them during their lives: if they died before Medcef Eden, this reversion descended to him, as their nephew and heir. He is the nearest connection appearing on the record; and the Court cannot intend that any one of the blood of the devisor stood between him and the ultimate devisees.

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S. Jones, in reply. The great features of this cause, as to fact, are in a narrow compass. On the death of Medcef Eden, the elder, the two sons entered, and were deemed seised in fee simple absolute. Joseph Eden's estate was sold to *bona fide* purchasers, upon judgments obtained against him. These purchasers bought upon the faith of a valid title in fee. The representatives of the debtor himself, now come to tear this estate from us; and whatever our claim may be, I trust that such claimants will not find countenance in this Court.

The whole question arises on the words of the limitation: The testator devised certain parcels of land to each of his sons, Joseph and Medcef, in fee. Joseph entered, died without issue, and you said his estate went over to Medcef. He also died without issue; and where is the foundation for the pretence that it does not go over to John Eden and Hannah Johnson? In common sense the words of both limitations are plain. According to this, the whole estate is gone over from Joseph and Medcef, and we are to remain in possession till one comes who has right. If the plaintiff recover, some technical rule must be applied in order to exclude us.

It is said that the technical meaning of these words, *dying without issue*, is an indefinite failure of issue. But they have two meanings. One is the natural import, a failure of issue at the devisee's death. This is the meaning which we apply in talking of our common affairs. On the other hand;

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(p) 2 Ven.
sen. 646.

it is said technically to mean an indefinite failure; that is, suppose the devise to have a family, and that family to continue down for ages: the devise looks to such an event. I is immaterial to us which is meant: if an indefinite failure the whole vested in the first devisee: if definite, the whole goes to the devisees in England.

You are examining the question of intent, as gentlemen have proved from *Garth v. Baldwin*.(p) You never go to the technical meaning, unless the case is stripped of every circumstance by which you can infer that the testator intended to depart from that meaning. And is it possible, when he says, that *if both these sons die without lawful issue, then over*, he means it *shall not go over*; though immediately before he so expressed himself in the same words as to carry over the same estate to the intermediate devisee? The whole is in the same single clause. If the estate of Joseph does not go over, what is the effect of the clause? This estate starts, on the testator's death, as a fee simple, and comes as such to Joseph; but on his death the same estate goes over to Medcef as a fee tail. Can you limit an estate tail upon a fee simple? A fee tail is sometimes limited over from one to another; but then it is a fee tail from the beginning. That it should start a fee simple and end a fee tail, is a thing unheard of. The operation of this clause is the same on the estate originally devised to Medcef Eden. Both must go over, if either does. You cannot separate them. Their destination is the same. One cannot go, and the other be retained. Joseph became invested with a fee, subject to the contingency of dying without lawful issue. Having issue, his estate would become a fee simple absolute. Not having issue, you said in *Anderson v. Jackson*, that it was a fee simple conditional, and you carried it over to Medcef. Now you are asked to change it into a fee tail.

But take the last limitation, *per se*. It is in case *both die without issue*, either definitely or indefinitely. It is the same as to both. Now suppose one to have died without, and the other with issue; is it to be construed definite as to one, and indefinite as to the other? Shall one half go over and one half remain? Is this an executory devise as to

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401.

one half, and as to the other an estate tail? Take the case put by the late Chancellor in *Anderson v. Jackson*. (q) Suppose the two sons had died leaving lawful issue which had died a few days after their deaths; the estate could not go over. The words have the same sense in both members of the sentence. If there was issue, it remained; if none, it went over. It must either be an estate for life with cross remainders, in fee tail, or an executory devise. You cannot give this effect to one part of the phrase, and withhold it as to the other. How is it made out an executory devise as between the sons, and not as between Medcef Eden and the ultimate devisees? *Survivor* is not, of itself, a word of limitation. *Dying without issue* are the words of limitation; and this, it is said, was restrained and made definite by the word *survivor*. But why may it not apply to the survivorship of Joseph, either with or without a child? If it does restrain the import of the general words, it is by way of showing the intent. The whole operation is upon the meaning. This being ascertained, what will you say of the same expression, in the same sentence; and in relation to the same estate? Could the testator speak, would he say, "I meant one thing by these words till I came to Medcef Eden, and another by the same words in the same sentence, in relation to the same subject matter, when I came to the final devisees? These words cannot be disconnected. The fallacy is, in considering the second *dying without issue* a different event from the first. The testator speaks first of *either* of his sons dying without issue, and in the same sentence of their *both* dying without issue; and the latter is connected in sense, as well as in phrase, with the first. Without a contradictory sense, you cannot sustain the judgment of the Court below. The well settled rule is, that you are to construe the will according to the circumstances, as they exist at the testator's death. The estate, as it started at the death of the testator, was plainly one in fee simple. Look to the period of his death. Is there any doubt of this? He then says, "I give A. to Joseph and B. to Medcef, each in fee; but if *one* die without issue, his share to the other; and if *both* die without issue, the whole to John and Han-

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nah." Are not these executory devises? If they are not so, no estate can go over, in virtue of these words. The only reason why a devise like this is ever construed to create an estate tail, is in order to support an ulterior vested remainder, because you can find no other particular estate to support it. Yet the Court below say, you cannot construe this limitation over, an executory devise, because the second was an estate tail, which was turned into a fee by the statute. This was calling it an estate tail, for the very purpose of destroying the limitation over, which should have been sustained if possible.

(r) 1 P. Wms.
563.

Slight words indeed are enough to restrain the generality of the expression *dying without issue*. In *Pinbury v. Elkin*, (r) the bequest was, *if she shall die without issue, by the said testator, then after her decease, £80 shall remain over; and the Lord Chancellor seized on the word then to carry over the bequest. That word is here. The phrase is, "and in case of both their deaths, without lawful issue, then I give all the property aforesaid to my brother," &c. The case cited shows what slight circumstances the Court will seize upon in order to give effect to a devise. The argument cited from Hargrave's Law Tracts, (523,) admits our general ground; but it is a sufficient answer that this argument was overruled in the very case where it was put forward.*

(s) 13 Ves.
483.
(t) 13 Ves.
484.

The authorities cited in the opening, are abundant to show that the whole phrase must be taken together; that the same words in the same phrase must be understood in the same sense. There is no magic in the word *survivor*. The word *other* would have been enough; as if the testator had said, in case either die without issue, then to the *other*. (s) In *Kirkpatrick v. Kilpatrick*, (t) the Lord Chancellor says, "the question upon the limitation over of this personal property, in the event of both dying without issue, under the age of 21, is a mere question of intention as it may be judicially collected from the whole will. If that limitation was intended to take effect after an indefinite failure of issue, it is too remote; if the failure of issue was confined to the death of the survivor, the limitation is valid." The reason that the words, *dying without issue*, in *Forth v. Chap-*

man, (u) were construed differently in the same sentence was because they referred to different subject matters; that is, to real and personal property respectively. As to *Sperling v. Toll*, (v) there was no intention of survivorship beyond the life estates; but the word *survivor* is used here to explain what is meant by the general words; and it comes back to the question; with what intention were the same words used subsequently?

If the estate were open, I should contend that this was an estate tail from the beginning; but I shall not, after what has fallen from the Court, press a re-consideration of *Anderson v. Jackson*. Though I agree, that security is found in uniformity of judicial decision; that this is the ark of our safety; that the maxim *stare decisis* should, generally, be applied; yet I do adjure this Court never to forego the practice of reviewing their decisions, where they have committed a plain error. Refuse to hear an argument, if there is even *doubt* on looking into the case; but where a great and alarming evil is to grow out of a monstrous error, the Court ought, unhesitatingly, to revise and correct it. This is the law of the House of Lords and of this Court.

It is due to the Chancellor, who dissented in *Anderson v. Jackson*, to say that the mere word *survivor* would not affect the technical meaning of the words *dying without issue*. There were no cases to this purpose produced upon the argument of that cause, except *Porter v. Bradley*, (w) and *Roe v. Jeffery*, (x) decided by Ld. Kenyon, since the revolution, and some of our own cases bottomed on the authority of these. The two cases decided by Ld. Kenyon, were professedly grounded upon *Pells v. Brown*, (y) but were not supported by it; and the constant tenor of the previous decisions were opposed to him. We now produce two cases from Croke, which are pointedly against him, and one of them (*Chadwick v. Cowley*) (z) is admitted to be so. The same question had been before agitated, and received a corresponding decision in *Clache's case*; (a) and *Chadwick v. Cowley* is cited as law in *Fortescue v. Abbott*, (b)

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(u) 1 P. Wms
663.
(v) 1 Ves
Sen. 70.

(w) 3 T. R.
143.
(x) 7 Id.
585

(y) Cro. Jac
590.

(z) Id. 695.

(a) Dy. 330
b Mich. 15 &
16 Eliz.
(b) Pollexf.
487.

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(c) 2 Fearn, 4th ed. 203.

Roe v. Scott & Smart, in Easter Term, 27 Geo. 3.(c) rejected the word *survivor* as having no influence in a similar case. Indeed, it is my entire conviction, that if this question were *res integra*, the devise to Joseph Eden would be holden an estate tail. The very consequence of this being an estate tail in Medcef Eden, had it been foreseen, would have been a most conclusive argument in favor of the first limitation being so too. The contingency is the death of both. Suppose Joseph to have had issue who had died after his death, would not this still be an estate tail in Medcef. Would not both estates go over on the double contingency? If you mean this as to one estate, you must mean it as to the other. Then there was a condition on the deviser's death, that on both dying without issue indefinitely, the whole should go over; but you are called upon to change the nature of the event; to vary the meaning of the will and disappoint the remainderman, upon the mere ground that the estate has changed hands; to make it a fee simple at one time, and a fee tail at another. We now no longer ask the aid of the rule which would make this an estate tail in Joseph. The moment you settled in *Anderson v. Jackson* that it was an executory devise, it carries us to the same point. You have changed the whole face of the will, and made it executory in all its parts; and there is no other way but by carrying it over, that you can rescue the will from contradiction and absurdity.

We might adduce many American cases to show the strong leaning of the Courts in favor of the natural meaning of the phrase *dying without issue*. The English Judges have used strong expressions to the same effect. In *Bigge v. Bensley*,(d) Lord Thurlow said to the Attorney General, "I agree with you, that the general sense of *dying without issue*, is at the time of the death. That is the grammatical construction, and is the sense, in general, of those who use the words;" and Ld. Hardwicke said *there was*

(d) 1 Br. Ch. Rep 187.

(e) 2 Atk. 209.

(f) 3 T. R. 143.

(g) 7 T. R. 585.

no doubt of the real intention in *Beauclerk v. Dormer*,(e) though he held it different from the technical one. In *Porter v. Bradley*,(f) and *Roe v. Jeffrey*,(g) Ld. Kenyon expressed himself to the same effect; and the whole was

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reated as mere matter of intention. In *Anderson v. Jackson*, the same doctrine is advanced as the principal ground of the decision ; and no very particular reliance was there placed upon the word *survivor*.

One mode, by which to avoid the natural meaning of the words, would have been by giving to Joseph and Medcef estates for life, which would have supported the limitation over as a remainder ; but these estates were expressly in fee, which were carried over to the survivor by the words *his share or part shall go, &c.* In *Jackson v. Merrill*, the words *their part* carried over an estate as extensive as the preceding one, which was, in that case, a fee simple. So here the whole interest necessarily goes over, as well as the subject of that interest.

But if it is to be considered a life estate, it was only so in Joseph's part. Medcef's estate remained a fee simple ; and you cannot avoid the absurdity of limiting a remainder in tail upon an antecedent fee, if you affirm this judgment of the Supreme Court. Their opinion was probably with us, upon the point which they mentioned ; "that as the whole devise is in one sentence, and the devise over to persons *in esse*, the same common intent is applicable to the limitation over to the brother and sister of the devisor, if both his sons should die without issue ; and that the same consequence would follow." But they cautiously omitted deciding this point ; going on other and erroneous grounds. The decision of that point would have settled the whole matter ; but they chose to go upon a point in relation to which we were not heard before them. The *ulterior* remainder was to persons *in esse* ; and the word *survivor* would have been nonsense. The devisor must have intended throughout the whole devise, either a definite or indefinite failure of issue. There is no doubt what their opinion must have been upon this point.

The Court below, put themselves on the ground, that the estate of John Eden and Hannah Johnson was turned into a remainder, when the executory devise took effect in favor of Medcef Eden. Now an executory devise, limited upon a previous devise in fee simple, never can turn into

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a remainder ; nor did a devise, executory in its own nature, ever undergo such a change. It either fails for want of the condition happening, or it continues executory. After a vested fee, as here, the limitation over must, in its nature, be executory. When Joseph died, he had a fee simple, which was defeated by his death without issue. The estate did not vanish, but went over to Medcef. It must, according to the Supreme Court, have vested in Medcef Eden before it could change into a remainder—upon what ? Why, upon Joseph's estate in fee simple. Medcef had a part of the lands in fee upon the first devise ; and as to the other half, this being an executory devise, was also vested in him as such. The Supreme Court agree that the limitation over from Joseph to Medcef was an executory devise. Now the authorities cited to show that on the vesting of the first estate the limitations over became also vested as remainders, relate to that kind of remainders which are executory devises, not in their own nature, but for a time ; as where the limitation was to A. for life, with remainder to his unborn son in tail ; then to the unborn son of B., for life, remainder to his unborn son's son in tail, remainder to the unborn son of C. in tail, &c., and then over in fee. This was the case of *Hopkins v. Hopkins*,^(h) cited by the Supreme Court and Serjeant Williams. It was agreed that if A. had lived and come to his life estate, the following estates would have been contingent remainders ; but he having died before the testator, they were executory devises. Upon the same principle that they would have been contingent, they would have been vested remainders on the first estate coming to A., if there had been any of the *ulterior* devisees for life, &c., *in esse*. It happened in that case, that none of the takers, previous to the ultimate devisee, were born at the time of the testator's death ; and the right of the last devisee was adopted as an estate of necessity to supply the vacancy. The whole estate went to him *ad interim* ; and the previous estates were executory only as being suspended. They were, in their nature, remainders. *Stephens v. Stephens*⁽ⁱ⁾ is still less in point. There the limitation was to A. and his heirs ; and if he should die before 21 years of age, then to such son of B. as should

h) 1 Alk. 580.

(i) Cas. Temp.
Talbot. 228.

attain 21 years, and the heirs male of his body ; and in default of his having a son, who should attain that age, then to such daughter or daughters of his as should attain that age, and the heirs of their bodies ; and in default of these then over to C. in fee. The whole question was whether the devise to the son who was afterwards born, but had not attained 21 years of age, or to the daughters, &c., was not too remote.

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In *Doe v. Fonnereau*,^(j) the estate was conveyed by the testator to his eldest son for life ; and he afterwards devised it, from and after his decease, to the heirs male of his body, and in default of such issue to his other sons, &c., in tail male, and for want of such issue to his right heirs ; and all the Court say is, that the life estate conveyed to the son, and the after devise to the heirs male of his body, did not unite so as to form an estate tail in him—that if he had a son the subsequent devise in tail would vest as a remainder, but not having a son, it was an executory devise according to the event. They were not contingent fee simples, and executory devises in their own nature, as here. There was no change. They began and continued estates tail throughout, and were in their nature capable of being sustained as vested remainders.

(j) Doug.
487.

The Court below relied upon Williams' note to 2 Saunders, 388 h ; but this commentary misled them as to the nature of the limitation. Williams uses the language cited by the Court, but by referring to the note, it will be seen to correspond with what we contend for. It is founded on the three cases which I have considered, and refers to the nature of the estate. I challenge the production of any case where a devise, in its own nature executory, was ever turned into a remainder. Something of this kind was contended in *Craig v. Stacey*.^(k) There, in the first place, estates tail were, apparently, limited upon a contingent fee. The estate was devised to an unborn child, if a female, and her heirs ; but if she die before marriage, then to A., and the heirs of her body ; and on the failure of them to B., and the heirs of her body, &c. A female child was born, who died unmarried. A. died leaving two daughters, who died without issue, and the estate was claimed by B. The objection

(k) Irish T
Rep. 249.

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(l) Ex. Dev.
411, 19, 20-6,
ed. 526.

(m) 6 Cr. tit.
28, ch. 20, s.
26, 28.

was made that the limitation to her was on a contingency too remote, viz. the indefinite failure of A.'s issue; and it was said that, in the three cases, from Atkyns, Cas. Temp. Talbot and Douglass, there was no previous limitation of the entire fee, as in that case; the very objection we make here. The Court admit the distinction, saying that the first devise was not a fee simple, but was equivalent to a fee tail. The Court doubted throughout, whether the whole were not to be considered an estate tail *ab initio*; but the estate tail having clearly vested in the daughters of A., it removed the difficulty; for both the precedent and subsequent estates then in question were estates tail, and capable of subsisting together as concurrent vested remainders. Both Fearne(l) and Cruise,(m) also relied upon by the Supreme Court, must be taken with the same qualification. Suppose a devise to A. in fee, and if he die without issue living B., then to B. in fee; and if he die without issue living C., then to C. in fee. These are plain executory devises throughout. Now suppose A. dies, living B., who takes the estate as owner? Does C.'s estate turn into a remainder? On what? On B.'s executory devise? That would be a remainder on a fee. The case supposed is precisely the one now under consideration. The Supreme Court turn the devise over to the English heirs into a remainder on Medcef Eden's fee.

It is singular that the statute of 1786, should be eulogized, if it has the strange operation of changing the devise into an estate tail, for the purpose in a round about way, of making it a fee simple in Medcef Eden. An executory devise of this nature always passes over, or becomes a fee. It never becomes a fee tail. A *limitation* is always, strictly speaking, of remainders. We speak improperly when we say, *limitation of executory devises*. They come in by way of substitution. If one does not take effect, the other comes in its place; and this is the reason why it is not destructible by fine or recovery. A fine by destroying the first estate, destroys all the remainders *limited* upon it. Not so as to executory devises, for there is no connection or dependence between the estates. The case of *Right v. Day*,(n) as it is stated in the marginal note, amounts to this: A devise to the son in fee, and if he die before 21, and should leave no issue, then to

(n) 16 East,
67.

the daughter and her heirs male or female ; and in case both die *leaving no issue*, then to his cousin and his heirs ; the son takes a fee with an executory devise to the daughter, with another executory devise over. These are thus considered executory devises throughout, being such in their own nature, although the first estate had vested.

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The case of *Right v. Day* is also in point, to show what slight words will qualify the meaning of the general words, *dying without issue*. There was merely a slight alteration in the phraseology, *leave* or *leaving no issue* ; and on these words, *leave* and *leaving*, it was said the estate might go over. Bayley, J. spoke generally, and said, "the words *dying without issue*, as they occur in this will, do not mean a dying without issue indefinitely, but under such special circumstances, as would enable the estates to go over to the daughter after the son's death ; that is, in case he died under 21, and without issue ; and to the cousin after the death of the daughter without issue." The whole are evidently continued along as executory devises, upon these slight words, although the estate had actually vested in the son.

But there is no longer any such thing as an estate tail in this country. Until lately, I did suppose with the opposing counsel, that the acts of 1782, and 1786, instead of simply repealing the statute *de donis*, had qualified or introduced a new rule founded upon that statute ; that is to say, they had suffered an estate tail to arise, and then turned it into an estate in fee simple ; and the words of the two acts would probably justify such an inference. But two years after the statute of 1786, all the English acts were repealed.^(o) Then there was an end of the statute *de donis*. Estates tail were gone. They were no longer to be converted into fees simple. They were left, as at common law, to become absolute on the birth of issue ; and even a limitation over on a conditional fee, was an executory devise, in its own nature, and must continue so. Medcef Eden, then, according to the reasoning of the Supreme Court, had conditional fees in himself ; and on his death without issue, the whole went over, in this point of view. The whole is reduced to the common law estate. The moment issue is born to the holder of this

^(o) 2 Green
leaf, 116, n. 37,
A. D. 1788.

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(p) 2 Decans.
Rep. 94.

estate, it becomes absolute and the taker may alien ; and the only clog is a want of ability to alien till this event. Mere estates, with us, are thus placed upon the same ground as in South Carolina. Being thrown back to the common law conditional fee, there is no longer any doubt. The very point has been decided in that state. These words, *dying without issue*, about which we are contending, whatever may be their construction in reference to a fee simple or fee tail, there is no doubt that they are sufficiently definite and limited, in themselves, to carry over a fee conditional. This was the very point argued and decided in *Cruger and others v. Heyward*, (p) and is placed by Chancellor Rutledge on grounds which cannot be shaken.

But it is said we have no right to shelter ourselves under the title of John Eden and Hannah Johnson. It is enough that we are in possession. We are assailed by one who has no title whatever, and shall he be permitted to say, "I will turn you out, though I am just as much a wrong doer as you, because I choose to fight their battle myself?" If the devisees of Medcef, the younger, claim under him as the heir of the English devisees, we know how to meet them ; but how are you to arrive at the facts which are to defeat us on this ground ? You must presume that John Eden and Hannah Johnson died before Medcef, the younger. Here is a special verdict. If this was the fact, the plaintiff below should have put it before the jury. If absent, and not heard of for 7 years, this should have been shown. For aught that appears, both those devisees are, and have been, for years, resident in this country. When one claims as heir, he must show the death of the ancestor—not call for proof from the opposite party that he is alive upon the presumption that he is dead.

The plaintiff in ejectment must recover upon the superior strength of his own title ; but the other side would reverse the rule. It is said, the defendant cannot shield himself by his possession, and that such is the rule in a writ of right. This we deny. In a writ of right, as well as in ejectment, the plaintiff must show a right *prima facie*, and then the issue is on the superior right. How is it possible that this should

be otherwise? Even a sub-lessee may show the title of his lessor at an end.

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But it is said that Medcef, the younger, made an actual entry; and this is claimed as a prior possession. That entry was with a view to avoid the fine; and did not give him possession. If one is in possession, he may hold against a stranger. Here, we may hold against the plaintiff, till the heir or devisee comes, as the plaintiff might do against us, if he were in possession.

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THE CHANCELLOR. This Court has heretofore determined, in the case of *Anderson v. Jackson*, that the devise of the share of either of these two brothers, when either should die without issue, to the survivor of them, was valid as an executory devise; and that Medcef Eden the younger, on the death of his brother Joseph, took the lands devised to Joseph. But this Court did not, in that case, decide, what estate Medcef Eden the younger took, in these lands. The cause now before us, renders it necessary to determine the nature and extent of his estate.

What *Anderson v. Jackson*
decided.

When Medcef Eden, the younger, came into possession of these lands, the first of the two executory devises took effect. That devise then ceased to be executory, and the estate which it conveyed vested in possession.

When 1st ex-
ecutory devise
took effect in
M. E.

The Supreme Court hold, that when the first of several executory devises vests in possession, those which follow vest in interest, at the same time, and ceasing to be executory, become vested remainders, subject to all the incidents of remainders. This doctrine is sufficiently supported by the cases cited by the Supreme Court, and it is clearly supported by the opinions of Fearne, Williams and Cruise, in their commentaries on this branch of the law.

When 1st ex-
ecutory devise
vests, those
following are
vested remain-
ders.

The doctrine itself seems conformable to some other principles. It is a rule that no remainder can exist, without a preceding estate to support it; and by another rule, whenever a devise of a future interest can take effect, as a remainder, it shall be so considered. It is entirely agreeable to these rules, that when the first devise becomes executed and form

This conforms
to other rules.

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Objections
considered.

a particular estate capable of supporting a remainder, succeeding devises shall be considered as remainders.

The objection to this doctrine is, that it may often defeat the intentions of the devisor. The essential difference between a remainder and an executory devise, being, that a remainder may be destroyed, and that an executory devise is protected; the real effect of this doctrine is, in some degree to narrow the operation of executory devises. If in a series of contingent devises of the same land, all which succeed the first, are considered as becoming remainders, when the first is executed and vests in possession; these succeeding remainders may be destroyed, and the intention of the devisor, in making the more remote dispositions may be frustrated. But these remainders can be defeated only by the owner of the preceding estate in possession; when this is done, the interest of a distant devisee is extinguished for the benefit of a prior devisee. Such an extinguishment cannot, in general, take place, until a considerable time after the death of the devisor, when the characters, situations or necessities of the devisees, may be very different from those which the devisor regarded as probable; and though the intention of the devisor, may be sometimes defeated, they are contravened only in favor of a nearer object of his affections, and for the purpose of unfettering the land from future interests long postponed. Our laws allow the owner of lands to devise them, according to his affections or his pleasure, when he gives his own absolute property in them: but when he devises a title which is absolute in himself, to different persons in succession, upon events and contingencies, which cannot occur, until long after his death, he seeks to establish a special course of succession and to give law to posterity. These contingent dispositions, when confined within moderate limits of time, are without objection, and are often very suitable provisions for the reasonable exigencies of families. When they are allowed to prevail through a long period, they become pernicious, and by whatever name they may be called, are in effect: entails, attended with all the evils of unalienable property in land. The rule that an executory devise shall not prevail, when it extends beyond a life or lives in being and 21 years and 9 months af-

terwards, is the first and great restriction upon these dispositions; and the rule now in question, is in effect, a farther restriction upon remote dispositions, which if they operate at all, can take effect only after two preceding estates have had their completion. Thus, in the case before us, the last devise to John Eden and Hannah Johnson, could never take effect, until the two preceding estates of Joseph Eden and Medcef Eden the younger, should have ceased. Where a deviser wishes to make provision for several persons, in different events, his purposes may often be as well accomplished by devising his land in parts, with executory devises of parts, upon single contingencies, as by the method so usual in England, of devising the whole or a large part of an estate to various persons, upon many successive contingencies. The desire to preserve an estate or a large part of it entire, as long as may be possible, is frequently a strong motive for remote executory devises; and so far as such devises may tend to prevent or postpone the division of lands, there is in this state no reason of law or motive of policy to support them. But all our law on this subject, is derived from England. If this rule operates as a restriction upon the power of the deviser to bind his lands, by a series of contingent devises, which from the number of lives concerned, may extend to a period long after his death; and if such a restriction has been found proper in England, it is still more proper here. We have abolished entails, and all dispositions of the nature of entails, are opposed to the policy of our institutions. The doctrine in question is entirely in accordance with the policy of our statute abolishing entails; and contingent devises subjected to this restriction, still have an operation sufficiently ample, for all salutary purposes. If this doctrine is law, I am sensible that it is not necessary here, to discuss the policy of the rule; and I concur with the Supreme Court, in holding it to be law, upon the authorities which that Court has cited. But as some of the English cases are indistinct upon this point, and the question is here new, I have thus briefly examined the principle involved in this rule and its practical effect.

The ultimate devise to John Eden and Hannah Johnson, was in fee simple. If, when the preceding estate of Medcef

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Entails abolished; and limitations in nature of entails contrary to our policy

Dev'te to J. E. and H. J. became a re

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remainder after
a fee tail,
which last a-
rose by impli-
cation.

Statute turned
it into fee sim-
ple.

To say that
devise to J. E.
and H. J. does
not go over, is
not inconsis-
tent with *An-
derson v. Jack-
son*.

Eden the younger, vested in possession, the right of John Eden and Hannah Johnson became a remainder, it must have been a remainder after a fee tail. Considering both these devises as becoming executed at the same time, and regarding them in connection, the estate of Medcef Eden the younger, was a fee tail, and the succeeding estate of John Eden and Hannah Johnson, was a remainder in fee simple, upon the termination of that estate tail. The case is so often mentioned in the English books, as an estate tail by implication; and this case is entirely analogous to those in which that construction has prevailed. Cruise's Digest, title Devise, ch. 18, sections 29, 30 and 31.

The consequence of this construction is, that our statute enacting that estates tail shall be estates in fee simple, converted the estate of Medcef Eden, the younger, into an estate in fee simple.

These principles decide this cause; and they render it unnecessary to consider other questions which the cause presents. But it is proper here, to consider the decision of this Court, in the case of *Anderson v. Jackson*, so far as to show, that my opinion in this cause, is consistent with that decision. This Court decided in that case, that the estate of Joseph Eden, was not a fee tail. That decision was evidently made, in order to give effect to the intention of the devisor; he having declared, that the survivor of his two sons, should have the share of the son who should first die without issue. This Court appear to have been governed in making that decision, by two reasons; first the meaning of the terms, dying without issue, which were understood in their ordinary sense; and secondly, the plain and forcible import of the term survivor. The first of these reasons has equal force, in respect to the devise to John Eden and Hannah Johnson; but the second reason is not applicable to the last devise, the devisor not having described John Eden and Hannah Johnson as survivors. In deciding, therefore, that the estate of Joseph Eden was not a fee tail, this Court by no means determined that the estate of his surviving brother, Medcef Eden the younger, was not such an estate. The use of the word survivor in the first case, and the absence of that term or any word of similar import, in the last case,

form a strong distinction between the two executory devises. The question in the case of *Anderson v. Jackson* was between the right of Joseph Eden and the right of Medcef Eden the younger. It was not necessary in that case, to determine, and this Court did not determine, the exact nature or extent of the estate which Medcef Eden the younger took, upon the death of his brother Joseph. The ultimate devise to John Eden and Hannah Johnson, was not in question, and nothing concerning their interest was or could be decided upon that occasion. The construction and operation of the two executory devises, in their relation to each other, presented questions, which were not before this Court, were not considered, and were not decided in that case. Indeed, these questions, as they now stand before us, could not arise, until after the death of Medcef Eden the younger. The opinion, that the last executory devise to John Eden and Hannah Johnson, was extinguished in the estate of Medcef Eden the younger, is therefore, I conceive, perfectly consistent with the former decision of this Court, that the first executory devise to Medcef Eden the younger, took effect upon the death of his brother Joseph.

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In using the expression, fee tail and estate tail, I mean throughout, such an estate as would have been in this state a fee tail, before the twelfth day of July, 1782, when the first statute abolishing entails was passed.

To recapitulate :

1. The interest of John Eden and Hannah Johnson, be- Recapitula-
tion.
came a vested remainder, when the preceding estate of Medcef Eden the younger, vested in possession.

2. In these circumstances, the estate of Medcef Eden the younger, was a fee tail, with a remainder in fee simple, to John Eden and Hannah Johnson, upon the termination of the estate tail.

3. Our statute converted the fee tail of Medcef Eden the younger, into a fee simple absolute.

I am accordingly, of opinion, that the judgment should be affirmed.

CRAMER, Senator. This case is brought before us by writ of Error, upon a judgment of the Supreme Court, giving a construction to the will of Medcef Eden, the elder.

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Two principal questions are raised :

1. What estate did Medcef Eden, the younger, take in the lands devised to his brother Joseph, on the death of the latter without issue, in July, 1812?

2. What estate, if any, did John Eden and Hannah Johnson take on the death of Medcef Eden, the younger, without issue, in July, 1819?

1st question
same as in *Anderson v. Jackson*.

The first and main question, is the same which was agitated and decided by this Court in the case of *Anderson v. Jackson*, (16 John. 386.) The decision in that case was on the same will, and in effect between the same parties; for though Anderson was the defendant in that suit, yet the Bank (as I understand the history of the case) on an allegation that they held property to a large amount depending on the same question, were permitted by this Court to be heard by their counsel, in opposition to the then claim of Medcef Eden.

This Court is, then, called on in a very solemn and impressive manner (for much ingenuity and legal learning have been displayed on this point by the counsel on both sides) to review its own decision on an important rule of law, affecting titles to real property. And though several members of this Court did, soon after the commencement of the argument on this point by the plaintiff's counsel, express a reluctance to suffer it to be at all agitated, yet it has been very fully and ably discussed; and manifestly, is the point on which they principally rely. I have, therefore, listened to the arguments, and examined that case with attention, and I am entirely satisfied as to the soundness and correctness of that decision; and I am also satisfied that it is in harmony with the most approved decisions in England, before and since our independence; that it is consistent with our policy, is supported by the ablest judicial opinions in our sister states, and ought not now to be disturbed.

(q) *Fosdick v. Cornell*, 1 John. Rep. 440. *Jackson v. Blanshan*, 3 id. 292. *Moffatt v. Strong*, 10 id. 12. *Jackson v. Staats*, 11 id. 337. *Anderson v. Jackson*, 16 id. 382.

But we have not, in my view of the subject, the power (and by *power* I mean *right*) now to question or impeach that judgment rendered by this Court, and founded on the uniform decisions of the Supreme Court during a period of more than *seventeen* years. (q) Wills have been made, and estates settled, on the principles of those cases, which have been

deemed and treated as a settled law of the land. They have been solemnly recognized by this Court, of the last resort, published to the world, held out to our citizens as the sure and established land marks by which they might, with perfect safety, regulate their conduct in acquiring or perfecting titles, or dispose of estates upon their dying beds, in such a manner that their honest intentions could not be defeated. It is now, however, sought to prevail on this Court, by reversing the judgment of the Supreme Court, to annul their own ; and thus overturn, at one fell blow, the numerous decisions which have for many years concurred in the doctrines on which that judgment is founded. Can any good citizen, for a moment contemplate the consequences of such a measure without alarm ? All the suitors, whose hopes may have been defeated by the decisions made upon these principles, will have the right to commence suits, and recover back the lands which have been awarded to their adversaries, without regard to the various intermediate alienations, or the value or extent of the improvements which may have been made by *bona fide* purchasers.

These evils, however, might be transient ; and affecting a few hundreds only, or possible a few thousand individuals, would probably terminate and be forgotten with the present generation. But a more momentous and ruinous consequence, would be the total insecurity of property, and all personal rights. An appeal, or writ of error, would be renewed, on the same point, at every session, like petitions for bounty lands, or bank incorporations, in the perpetual hope of finding a friend in every new member. Law suits would be multiplied and interminable ; or decided, only by the perseverance of suitors, or rather by the length of their purses. Men of discretion, friends to peace, order and industry would flee a country where nothing is stable or secure.

Various attempts have been made in the House of Lords in England, sitting as a Court of appeal, to reconsider with a view to reverse their own decisions, but ultimately without success. A collection of these cases may be found in a note to 1 Ridgway's Reports, 509. In one of these cases, (*Broughton v. Delves*), (r) Lord Cambden was for reversing the judgment of the King's Bench. The house had been

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. The maxim
stare decisis
vindicated.

Particular
evil of depart-
ing from that
maxim.

General evil
of doing so.

Doctrine of
the House of
Lords.

(r) 1 Ridgw
Rep. 513.

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(s) And vid.
Magrath v.
Muskerry, 1
Ridgw. Rep.
469.

Remedy is
properly legis-
lative.

Anderson v.
Jackson de-
cides that de-
vise to M. E.
was good, as
executory de-
vise.
Ground of de-
cision.

The words dy-
ing without is-
sue, *per se*,
mean indefi-
nite failure.

New suits for
land withheld,
notwithstand-
ing *Anderson*
v. *Jackson* ;

equally divided whereby the judgment of the K. B. was affirmed against his opinion ; but on a petition for a re-hearing he strenuously opposed it, and the petition was unanimously rejected.(s) I hope that we may, and I trust we shall, exhibit equal firmness and stability. Thus, we shall suppress a repetition of such attempts in future, and preserve to the citizens of this state one judicial forum, where the wearied and exhausted suitor may ascertain his rights, and repose from litigation.

If any general mischief or inconvenience should at any time be experienced from this or any other decision of ours, the legislature are competent to apply a remedy, and will no doubt do it, with a saving as to all rights acquired under those decisions.

By the judgment of this Court in the case of *Anderson v. Jackson*, it is decided that the devise over to Medcef, on the death of his brother Joseph, without issue, was a good *executory devise*. This decision rests on the single circumstance of the word *survivor*, which necessarily limited the failure of issue to a life in being ; and the Court as well as the counsel, unanimously agreed, (as may be collected from their arguments and opinions,) that if the limitation over had been on a mere *failure of issue*, without the use of the word *survivor*, it would have been void, as being a limitation on an indefinite failure of issue ; and so tending to a perpetuity.

Such is the inflexible rule of law, established and respected for ages, and to depart from it, at this day, might unsettle half the titles in the state. By that judgment it was decided that Medcef Eden was, and had been since August 29th, 1812, entitled to the possession of all the real property which by the will of his father was devised to Joseph, and by necessary implication, that the title of the Bank and of the other plaintiff in Error, ceased on that day ; being the day on which Joseph Eden died.

The ejectment against Anderson was brought to settle, and did settle the effect of the first devise. And it was to be presumed that after the decision of that point, by this Court of the last resort, the persons who had purchased and entered under the title of Joseph, and who had no pretence of

any other title, would have surrendered the premises to Medcef. This, however, has not been done, and he instituted suits to recover possession of the land withheld. These suits, it seems, were defended; and before the trial Medcef Eden died, without issue, having devised all his estate to his wife and her daughters. And the occupants of the lands, devised to Joseph, now resist the claim under Medcef, by setting up the last devise, which is in these words: "And in case of both their deaths, without lawful issue, all the property aforesaid to my brother John Eden, of Loftus, in Cleaveland, in Yorkshire, and my sister Hannah Johnson, of Whitby, in Yorkshire, and their heirs." The plaintiffs in Error, now insist, that by this devise, the estate of Joseph and indeed the whole estate vested in John Eden and Hannah Johnson, and that therefore, the devisees of Medcef Eden, the younger, are not entitled to a writ of possession.

2. The effect of the last devise, therefore remains to be examined; and in arriving at a just conclusion upon that point, we shall be much aided by recurring again to the case of *Anderson v. Jackson*. It has before been remarked, that the decision, in that case, turned wholly on the word *survivor*, which word alone rescued the first limitation from destruction. This is in unison with the several cases decided by the Supreme Court of this state, from the case of *Friedick v Cornell*,^(t) to that of *Jackson v. Billinger*.^(u)

In all these cases there is no dissent from the opinion, that a general dying without issue, omitting words which confine it to a life in being, is a limitation on an indefinite failure of issue, and therefore void; a construction which cannot be denied, and which is founded in sound policy. If we depart from this salutary rule, we shall, in the course of a few generations, have a great portion, if not the whole of the landed property, in the state, so shackled as to be rendered unalienable; for almost every man would be desirous to perpetuate his property among his own blood relation, and would therefore limit it to an indefinite extent, if the policy and rules of law would permit. It would be useless and unprofitable to cite an authority, in order to establish the well settled rule of law upon this head. All those

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But M. E. dies
before trial
without issue,
and occupants
set up last de-
vise.

Effect of last
devise examin-
ed

(t) 1 John.
440.
(u) 18 id. 368.

The rule that
words dying
without issue,
per se, mean
indefinite fail-
ure, &c. far-
ther consider-
ed

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Lion.

(v) Doug. 470.

Whether word
survivor can
be implied in
last devise.

referred to by the late Chancellor Kent, in the case of *Anderson v. Jackson*, and all those cited by the counsel in that case, at page 385, of the volume in which it is reported, so far as I have been able to examine and judge of them, concur in its support. It is, therefore, in my judgment, no longer the subject of reasoning or doubt. It has become obligatory upon all our Courts, and can be abolished, or impugned, only by legislative power.® Indeed, the ingenious and learned counsel for the plaintiffs in Error, were constrained to admit the antiquity, the uniformity and the paramount correctness of the rule; but they endeavor to escape from its operation, in this case, by insisting that the last devise is on a qualified or definite failure of issue, and means, by implication, a dying without issue, in the lifetime of John Eden and Hannah Johnson, or issue living at the death of the surviving son. Let any man of common sense read these words, and say if he can discover any such meaning. To me it is most manifest, that it was the settled intention of the testator, to give the estate to the *heirs* of John Eden and Hannah Johnson, in case they should die before his sons, (an event to be expected, according to the natural course of life,) whenever the issue of the sons should become extinct. In *Doe v. Fonnereau*, (v) Ld. Mansfield asked Serjeant Hill, whether he had been able to find any case of real property, where the Court, on the words *in default of such issue*, had implied a restriction to issue living at the death of the father, and the learned Serjeant acknowledged, that he had not been able to find any such case. It would, therefore, be as repugnant to law and precedent as to reason and common sense, to infer such a restriction.

But the learned counsel for the plaintiffs in Error, aware of the fallacy of such a position, say, that as the testator in the first limitation used the words *survivor*, and the second limitation being in the same sentence, and respecting the same subject, we have a right, and it becomes the duty of this Court, to supply the word *survivor* in this branch of the sentence. In reply to this suggestion, it may be justly remarked, that the subject of the devise is different; the one being of part, only, of the land, and the other of the whole. The different devises, also, relate to persons standing in dif.

ferent relations to the testator, the first being to his own children, the second to collateral relations. It is, therefore, to be expected, that he would use different words, and have different intentions. He has used different words, and most obviously had different intentions. Yet it is earnestly pressed upon us to insert this word *survivor* in the last devise, where the testator has not seen fit to use it, and where we are bound to infer that he did not intend to use it.

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If we were disposed to supply this word *survivor*, it has not been shown in what manner this is to be accomplished; nor where the word ought to be placed. I have attempted it in vain; it is not possible to insert this word alone, so as to make common sense of the paragraph. I invite the members of this Court to make the experiment, and I think they will be satisfied of its impracticability.

The counsel for the plaintiffs in Error, sensible of this difficulty, insist that if we cannot insert this single word so as to produce the effect desired, we must supply other words which will. Thus, after the words, *lawful issue*, in the last devise, insert, '*living at their death*,' or '*at the time of the death of the survivor of them*;' and after the words, John Eden and Hannah Johnson, insert, '*in case they should survive my said sons*.' All this, or something equivalent, must be supplied, or the construction, here contended for cannot be sustained. This, I presume, the Court will not do; for it is not the province of this or any other Court to make a will for the testator, but to settle the legal construction of that which he has made.

I have examined this case with all the assiduity and attention justly due to the magnitude of the controversy, and the importance of the principles it involves; and unless I totally misunderstand the import of this bill, and misconceive the law applicable to it, the judgment of the Supreme Court (though the learned Judge, who delivered the opinion of that Court, took a different ground in relation to one of the points) maintains the legitimate construction of the testator's will, without addition or diminution; is congenial with our policy and laws; is supported by an uninterrupted series of the ablest adjudications, and should, therefore, be affirmed.

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Murray
v.
Mumford.

The rest of the Court concurring in the result of these opinions, (King, Senator, dissenting,) it was thereupon ORDERED, ADJUDGED and DECREED, that the judgment of the Supreme Court be affirmed ; and that the record be remitted, &c.

NOTE.—No division of the Court was had upon the different grounds taken, by the CHANCELLOR and by CRAMER Senator, against the ulterior devise going over, but the Court voted generally to affirm the judgment.

[The two following cases should have been inserted as of the September session, 1823.]

MURRAY against MUMFORD and others.

Rule, on dismissing an appeal upon the second call of the cause, that the appellant pay the respondent 100 dollars besides the taxable costs; the court being of opinion that the appellant had conducted vexatiously. The power of the court to allow beyond the taxable costs, considered.

APPEAL from the Court of Chancery. This cause having been placed upon the list of causes for argument, pursuant to the 14th rule of September 18th, 1818; and having been called and passed twice, in consequence of the appellant not being ready to argue, the respondent took a decree, dismissing the appeal with costs, pursuant to the 15th rule of this Court, (September 18th, 1818 ;) and now,

Warner & S. Jones, for the respondents, moved, that the appellant be ordered to pay 100 dollars to the respondents, over and above the taxable costs. He adverted to the merits of the appeal ; and contended that it was merely for vexation and delay.

J. V. Henry & J. O. Hoffman, contra.

WOODWORTH, J. Had the cause been heard, it would be proper to speak of the merits ; but as the appellant did not choose to bring it forward, we can only look to the circumstances attending the appeal and dismissal, as they have come under our observation. The appellant had a right to withhold an examination of the merits ; and take the effect of a simple dismissal under the 15th rule of this Court, but

he should not proceed vexatiously. He has kept the respondents in attendance, by their counsel, for several days, and at considerable expense, without any intimation that he would finally abandon the cause ; but rather the contrary appearance has been held out. The appellant's counsel have been attending as if prepared ; and for this no excuse is given ; nothing to satisfy us that it was in good faith. I think, under the circumstances, the motion should be granted.

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Mamford.

SUTHERLAND, J. There is no propriety in examining the merits ; but I think the motion should be granted. The taxable costs are a very inadequate compensation for the attendance of counsel here from day to day, at great expense.

SAVAGE, C. J. I know of no statute authorizing this amercement. The party had a right to bring his appeal. He declines a giving it. This he had a right to do, and to incur the consequences of a simple dismissal. What are these consequences ? The 15th rule of this Court says, the dismissal shall be with costs, which means no more than *taxable costs*. Suppose a nonsuit in a Court of law. The statute says the defendant shall recover his costs : was it ever heard of, that the party should be mulcted in a round sum, beyond what the taxing officer would allow ? I am against the motion.

ROOT, President. I am of opinion that this Court is expressly prohibited from going beyond the taxable bill. The statute^(a) applies in terms to this as well as other Courts, and is imperative, that *no officer or other person shall be allowed any greater or other fee or reward, &c., than after the rate specified by it*. This act was passed for the purpose of regulating the taxable fees as between party and party. It is so understood in practice, as to all the other Courts to which it relates ; and I know of no rule by which this Court is exempt from its operation. I had thought the ancient doctrine of amercement, *pro falso suo clamore*, long since exploded, as impolitic and absurd.

(a) 2 R. L. 3

STRANAHAN, Senator, thought the statute had no application to this question.

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CLARK, Senator, was opposed to the allowance of any thing beyond the taxable costs.

REDFIELD, Senator, concurred with Mr. Justice Woodworth.

EARLL, Senator, concurred with the Chief Justice.

PORTER, Senator, concurred with Mr. Justice Woodworth.

A MAJORITY OF THE COURT, being for the motion,
Rule accordingly.(b)

(b) I did not examine the eyes and nose upon this motion, but my recollection is, that the court stood about 14 to 11.

ELISHA EASTON, appellant,
against

JAMES TALLMADGE and others, respondents.

The question considered, whether this court can, on affirmance of a decree of the Court of Chancery, upon appeal, order the appellant to pay the respondent a sum beyond the taxable costs.

Additional sum refused under the circumstances of the case.

THIS cause having been argued at the present session by H. R. Storrs for the appellant, and J. Sudam and J. Tallmadge for the respondents; and the decree, of his Honor the late Chancellor, unanimously affirmed;

P. Ruggles, for the respondents, now moved for a rule that the 100 dollars, deposited in the Register's office of the Court below, be paid to the respondents, over and above the taxable costs.

Root, President. I hope the motion will be denied, upon the principle that there is a statutory provision against it. Whatever the practice of this Court might otherwise have been, it is enough that there is a statute imperatively prohibiting this extra allowance. Any rule which we can make will not warrant it; and it would be a penal offence for an officer, or any other person, to receive the money, notwithstanding any sanction which it is in our power to give. I am aware there are precedents the other way. This Court have

granted motions like the present, in imitation of the House of Lords. But there is no statute imposing a fee bill upon that house, and declaring, as with us, that it shall not be exceeded. I regret that such a precedent should have been made. The same principle reaches the Court of Chancery and the various Courts of Equity in the state. Why have they not the same right with us to amerce for *false clamor* in the suitor? I hope that *Murray v. Mumford*(a) will be the last case in which we shall hear of this power being exercised.

ALBANY,
Dec. 1833.

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v.
Tallmadge.

(a, Ante, 400

WOODWORTH, J. I have no doubt of our own power, or of the power of the Court of Chancery, to make the allowance; and I am prepared, if it were necessary, to show this to be so within the constitution and laws of the state. There is nothing in it incompatible with the act regulating the fees of the several officers and ministers of justice. No officer is to receive fees beyond the rate fixed by that statute; and it would be penal for him to receive more. But the present is a question between party and party. The power of this Court is established by numerous precedents. It has been concurred in and exercised by all the sages of the law who ever sat here; and I confess, it struck me with surprise, that our power should be questioned, when the motion was made the other day, in *Murray v. Mumford*. The course which that motion took led me to look into the cases where this power has been recognised; and I think there are ten or twelve cases in this Court. The late Chancellor had occasion to examine this question at the last term in New York; and he considers it a power necessarily incident to that Court, as a protection against vexatious and oppressive litigation. Mark how distinguished a course the legislature themselves have taken on this question. At law, you shall not pursue the defendant for trifling sums in the higher Courts, except under the penalty of paying costs; but they declare, specifically, when you shall have costs and when they shall be denied. This is not so in Chancery; costs are discretionary. The statute merely fixes the rate of allowance when single costs are awarded by the decree. It does not take away the power of the Chancellor to allow more by way of penalty. So much, I thought it my duty to say as to the principle, in the abstract.

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Dec. 1883.

Eaton
vs
Talmadge.

It is perhaps unnecessary to pursue the discussion; for should our power be conceded, I do not think there is anything, in this case, which calls for amercement.

BOWNE, Senator. I hope a day will be assigned for hearing counsel upon the question whether we have power to make the allowance. It is important, if we are to pass upon it again, that it should be done deliberately. I voted for amercement in *Murray v. Mumford*, and understood the law members of the Court as finally acquiescing in the decision then made. This question should be settled.

SANFORD, Chancellor. As there is a serious difference of opinion between the members of the Court, I agree that the question should be discussed and settled deliberately. We granted a similar application the other day in *Murray v. Mumford*, but our power is still questioned. I would deny this motion, under the circumstances of the case; but hold the question, upon our right, open for discussion when it shall hereafter arise.

STRANAHAN, Senator. The Court have very recently decided this question, and in my opinion rightly. I have no objection that counsel should be heard, but am satisfied with the decision in *Murray v. Mumford*. It was according to the precedents; and I think we should not invite further discussion. As at present advised, I concur that the allowance should not be made, under the circumstances of this case.

CRAMER, Senator, concurred.

CLARK, Senator. I am opposed to the motion upon the general ground that we have no power to grant it.

Motion denied

(4) Owing to the turn which this matter took, Mr. Justice Woodworth did not cite the cases to which he alluded. The following, I presume, are some of them: *Monkhouse v. The Corporation of Bedford*, 17 Ves. 380. *Deas v. Thorn and others*, 3 John. Rep. 541, 552. *Waters v. Travis*, 9 John. Rep. 450, 469. *Post v. Kimberly*, id. 470, 506. *Rathbone v. Warren*, 10 John. Rep. 567, 596. *Bugert v. Perry*, 17 John. Rep. 351, 353. *Barry v. Thompson*, id. 436, 437.

CASES IN THE SUPREME COURT.

VOL. II.

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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF NEW YORK,

DURING THE PERIOD OF THESE REPORTS.

JOHN SAVAGE *Chief Justice,*
JACOB SUTHERLAND, { *Justices.*
JOHN WOODWORTH,

CIRCUIT JUDGES.

FIRST CIRCUIT.

OGDEN EDWARDS.

SECOND CIRCUIT.

SAMUEL R. BETTS.

THIRD CIRCUIT.

WILLIAM A. DUER.

FOURTH CIRCUIT.

R. HYDE WALWORTH.

FIFTH CIRCUIT

NATHAN WILLIAMS.

SIXTH CIRCUIT.

SAMUEL NELSON.

SEVENTH CIRCUIT.

ENOS T. THROOP.

EIGHTH CIRCUIT.

WILLIAM B. ROCHESTER.

SAMUEL A. TALCOTT, *Attorney General.*

CASES
ARGUED AND DETERMINED
IN THE
S U P R E M E C O U R T
OF THE
STATE OF NEW YORK,
IN OCTOBER TERM, 1823, IN THE FORTY-EIGHTH YEAR OF OUR
INDEPENDENCE.

Ex parte FARRINGTON.

THE facts of this case appear, sufficiently in the opinion of the Court which was delivered by,

SAVAGE, Ch. Justice. This is an application for a rule, that the supervisors of Delaware county, show cause, why a mandamus should not issue, commanding them to audit and allow an account, presented by Farrington, for services as a constable. The presiding supervisor, states, that the board were willing to allow it, reducing the charge for serving subpoenas. This charge was 19 cents for serving each subpoena, in behalf of the people, besides mileage. The board thought the charge too high ; and they were correct. The statute, (2 R. L. 27,) gives 19 cents for serving a warrant, and 12½ cents for serving a summons ; but a subpoena is not mentioned. By the 25 dollar act, (1 R. L. 399, s. 26,) 12½ cents are allowed to the constable, or other person, making the service. In criminal cases, also, a subpoena may

Amount of the allowance to constable or other person, for serving subpoenas, in criminal cases, is a matter of discretion, in the board of supervisors, with which this court will not interfere.

They may be served by any person as in civil cases.

It seems that 19 cents for service, besides mileage, would be too high.

ALBANY,
October, 1823.

Rew
v.
Barker.

be served by any person, but no specific compensation is fixed by law. It is, therefore a matter resting in the discretion of the supervisors. It does not appear what they were willing to give, but they would have audited the whole account at \$4 69. They have not refused to act; and the amount being a matter of discretion, it is a subject over which the Court has no control.

Motion denied.

N. B. Another account which had been presented to the board was also in question, upon this motion; but it is not deemed material to notice it.

REW *against* BARKER.

On error from the court of C. P. the record, in the eye of the law, for the purpose of being amended by that court, remains in the court below. Or if otherwise, this court have power to amend it themselves.

A mistake in framing a special verdict in the C. P. may be amended there, after error to this court, joinder in error, and several motions of argument; especially where the

ERROR, from the Common Pleas of the county of Onondaga. The action was brought, in the Court below, by Barker against Rew, on a warranty of title in a horse, bought by Barker of Rew. A verdict having been found for the plaintiff, a motion was made for a new trial, on a case. The motion was denied, and leave given, by the Court, to turn the case into a special verdict; on which the present writ of error was brought. In making up the special verdict, the purchase of the horse was, by mistake, stated to have been on the 19th November, 1819, being after the time when the suit, as appeared by the record, was commenced in the Court below; whereas it should have been Nov. 1818. An issue of *in nullo est erratum*, had been joined here, and the cause noticed for argument several times, when the defendant in error discovered this mistake; and, as soon after as possible, moved for, and obtained an amendment, according to the fact, in the Court below. This was at August term of that Court, 1823; and now,

delay is accounted for: as where, by mistake, a sale, in question upon the trial below was in the special verdict, stated to have been after, instead of before, the suit brought.

After joinder in error, the party cannot allege diminution, and have a *certiorari*

S. A. Foot, moved to amend the return, so as to make it correspond with the amended verdict in the Court below. He referred to 2 Dunl. Pr. 703, and the cases there cited, and *Tillotson v. Cheetkam*, (3 John. Rep. 95)

ALBANY,
October, 1898

Row
v.
Barker.

S. Van Rensselaer, contra. A writ of error, to an inferior Court, removes, in judgment of law, the record itself; (2 Tidd. 1089, 90; 3 Caines' Rep. 86, 7; 3 John. Rep. 444;) though it is otherwise of a writ of error to the Supreme Court. (3 John. Rep. 98.) In both cases, execution issues from the Supreme Court: in one, because the record is removed there—in the other, because it remains there. If, then, the record was removed, the Common Pleas had no right to amend; (1 R. L. 127;) and there is nothing to amend by in this Court. It is too late to move for an amendment, after having pleaded *in nullo est erratum*. The defendant in error, could not, at this stage of the proceedings, even allege diminution, which is merely for the purpose of supplying defects. This is never allowed in order to question the truth of the record certified. (Bac. Abr. Error, (E.))

If the Error is merely formal, there is no need of an amendment. If it is matter of substance, and yet may be amended, there is no need of a Court for the correction of errors. The Court below may amend away the plaintiff's rights, at discretion.

Again: the objection, of laches, is sufficient. Not only is there an issue joined, but the cause has been several times noticed for argument.

Curia. The delay of making this motion is fully accounted for; and the objection, of laches, fails. It is true, as contended, that here is a joinder in error, which admits the return to be perfect. It is, therefore, too late to allege *diminution*, and no *certiorari* can be awarded. But that objection does not reach the case. The office of a *certiorari* is to bring up matter of record, omitted in the return. The object here, is to amend, by the alteration of a date, in such a manner as plainly to subserve the ends of justice; and we think the case of *Tully v. Sparkes*, (2 Ld. Raym. 1570; 2 Str. 369,) fully justifies the motion. That case was error

ALBANY,
October, 1823.

Holmes
v.
Remson.

from the K. B. to the Exchequer Chamber. A motion was made in the latter Court, for leave to amend imperfections in the record. They refused this, in the first instance, but gave time for applying to the K. B. which amended; and the Exchequer Chamber afterwards made a corresponding amendment in the transcript, and this too, after a joinder in error and argument in that Court. It is said, the Court below could not amend, because the record was brought up by the writ of error. But this is not so. For the purposes of amendment, it remains in the Court below; and the Exchequer Chamber considered it so, in *Tully v. Sparkes*, and proceeded accordingly. This case, with others to the same point, are cited as sound law, in *Tillotson v. Cheetham*, (3 John. Rep. 95.) The Court below have amended, as in *Tully v. Sparkes*. But suppose the record here, we would amend it ourselves. (*Pease et al. v. Morgan*, 7 John. Rep. 468.) The principle of this case was acted upon in *Price v. M'Evers*, (Col. Cas. 41,) in the Court of Errors. The inaccuracy of the special verdict arises from the mere oversight of the Judge in the Court below. It comes within the very common principle of amendments, that it is a mistake of an officer; and the motion must be granted.

Rule accordingly.

HOLMES and others, trustees for all the creditors of MULLET, an absent debtor, *against* REMSON and others, executors, &c. of CLASON, deceased.

Where a party inadvertently omits to file papers, neces-

THIS cause was tried April 12th, 1821, when a verdict was found for the plaintiffs, subject to the opinion of the Court, sary to warrant his judgment, or to render it formally correct, or commits a formal mistake, in drawing up his judgment roll, it is of course, on motion, to allow an amendment: as where he omits to file the *nisi prius* record, postea, clerk's certificate, venire, and panel. These may be filed *nunc pro tunc*.

And if these, or the like papers, are lost, the court will allow new ones to be drawn and filed.

And they will allow the party to amend his continuances or a *nisi prius* clause, in the judgment roll.

These, and the like amendments, will be allowed after error brought, after paying the costs of the motion; and the proceedings in error, provided the plaintiff in error choose to discontinue.

on a case, which was made; and in August term, 1822, the Court delivered their opinion in favor of the defendants. (20 John. 229, S. C.) The defendants' attorney then drew the record; but having soon after left the city of New York, where he resided, and where the cause was tried, on account of the yellow fever prevailing there, he did not then search for the *nisi prius* record. The judgment was afterwards delayed by an order to stay proceedings, and a motion to amend the case, and for a re-hearing, on the part of the plaintiffs, till January term, 1823, when the motion was denied. The judgment was then further delayed, by an injunction, till February thereafter, which being then dissolved, the defendants' attorney caused the judgment to be signed and filed, but forgot to search for the *nisi prius* record. On the 25th of July last the plaintiffs sued out a writ of error. The defendants' attorney inquired for the *nisi prius* record at the office of the Clerk of the sittings, where it was not found; nor could the plaintiff's attorney give him any account of it.

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October, 1823

Holmes
v.
Remson.

In the record, the venire was awarded as returnable in October term, 1819, at the City Hall of the city of New York, and the parties were stated as appearing there; whereas by an appointment of the Governor, (the yellow fever prevailing in New York,) the Court was then held at the Capitol in the city of Albany. There was also a mistake in the *nisi prius* clause, in omitting the usual words, "if they, or either of them at a sittings appointed," and in some other particulars.

P. A. Jay, for the defendants, moved for leave to file a *nisi prius* record, *postea*, *Clerk's certificate*, *venire*, and *panel*, *nunc pro tunc*, as of the term of May, 1821, and also to amend the record, in the particulars specified.

Hopkins, contra.

Curia. It is a matter of course to allow these and the like amendments, where the omission or informality is accounted for. We grant the rule as applied for, on paying the costs of this motion, and if the plaintiffs choose to dis-

ALBANY,
October, 1823.

Alendorf
v.
Stickle.

continue their proceedings in error, the defendants must also pay the costs of the writ of error.

Rule accordingly.

ALENDORF *against* STICKLE.

The judgment, on a report of referees upon bond conditioned to pay money and perform covenants, though reduced by set off to \$13, should be for the penalty, as a security for further breaches; and the plaintiff shall have costs, according to the amount of the penalty. Otherwise, where the condition is for the payment of money only.

DEBT, on the penalty of a bond for \$3000, conditioned for the payment of \$1500, and the performance of other acts; with a partial assignment of breaches. Plea, *non est factum*, with notice of set off, of accounts. The cause being referred, the referees reported a balance of only 13 dollars due to the plaintiff, who filed the report, and entered a rule for judgment, upon the penalty.

J. W. Wheeler, in behalf of the defendants, now moved for costs, to be set off against the plaintiff's recovery; and that the judgment be corrected according to the statute, (1 R. L. 515, 516, s. 1.)

H. B. Davis, contra. The plaintiff is entitled to judgment for the penalty, as a security for further breaches. (1 R. L. 518, s. 7. *Hodges v. Suffelt*, 2 John. Cas. 406. *Pearson v. Bailey*, 10 John. 219.) Had the sum been found by verdict, there would have been no doubt of this. Does finding the same sum, upon reference, alter the case? Here is a discount, by set off, from \$1500 to \$13. The claim exceeded \$400, within the statute, (L. N. Y. sess. 41, ch. 79, s. 1.)

Wheeler, in reply. The plaintiff does not take his judgment for the penalty, but for the balance found. (1 R. L. 516.) The provisions referred to, in the 50 dollar act, relate to *accounts not bonds*.

Curia. The plaintiff must take costs according to his judgment, which is for the penalty. *Godfrey v. Vancott*, 13 John. 345.) It is peculiarly proper, in this case, that it

should be so, for the bond is conditioned, among other things, to perform covenants; and the judgment ought to stand as security for further breaches. It would have been otherwise, had it been merely for the payment of money. (*Van Antwerp v. Ingersoll*, 3 Caines' Rep. 107. 1 R. L. 515, 516.)

ALBANY,
October, 1823

Abernathy
v.
Abernathy.

Motion denied.

ABERNATHY against ABERNATHY.

ASSUMPSIT, by payee against maker, on three promissory notes; the first, dated Feb. 21st, 1816, for \$200; the second, April 19th, 1819, for \$39 50; and the third, Jan. 1st, 1820, for \$28. The plaintiff's proof, on the trial, was, that the note of \$39 50, was given on a full settlement of accounts between the parties.

In an action of assumpsit, brought in this court, if the plaintiff recover \$50 only, he is not entitled to costs, but must pay costs to the defendant. And the costs, on motion, will be set off against the plaintiff's damages.

The defendant proved a promissory note of \$600, given by the plaintiff to him, dated Nov. 5th, 1816; that when this was given, the note of \$200 was paid, and the plaintiff, not having it present, agreed to destroy it; but nothing was claimed to be due on the other note for \$600, which was introduced merely as a part of the transaction, and to show a payment of the note of \$200. Payment by the defendant

If in an action in this court, the accounts of the parties, proved at the trial, exceed \$400,

and the plaintiff recover a sum not exceeding \$50, whether he is entitled to costs, or must pay costs to the defendant? *Quære.*

The proviso to the 1st section of the \$50 act, which denies jurisdiction to a justice of the peace, of matters of account, when the sum total of the accounts of both parties, &c., amounts to \$400, extends to those accounts, only, which are open and unliquidated between the parties.

When they have been settled, the balance alone is the account between them. And unless this balance, with the other accounts, exceed \$400, a justice has jurisdiction. Accounts, as used in the proviso to the 1st section of the \$25 act, have the same import as in the proviso to the 1st section of the \$50 act.

So in the proviso to the 5th section of the act concerning costs.

Accordingly, where on the trial of a cause at the circuit, the plaintiff proved a note of \$200 against the defendant, who then proved a note of \$600 against the plaintiff, and that, when the latter was given, the plaintiff agreed to destroy the former; but the defendant claimed nothing as due upon the latter; *held*, that neither of these notes could be considered accounts between the parties; and the plaintiff having recovered \$50 upon other claims; *held*, farther, that if the plaintiff could be entitled to costs in this court, on the ground that the accounts of both parties, proved at the trial, amounted to \$400, neither of the said notes could be considered as part of such accounts.

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October, 1823.

Abernathy
v.
Abernathy.

of \$50, on a bond given by the plaintiff, to a third person, was also proved, but disallowed as a set off, because no request, by the plaintiff, to pay it was proved. The defendant then proved a set off of \$24, for boarding the plaintiff and the jury found for the plaintiff for \$50.

Sudam, in behalf of the defendant, moved for costs, to be set off against the damages of the plaintiff. He cited 1 R. L. 387, Laws, N. Y. sess. 41, ch. 94, s. 1 & 5. 1 R. L. 344, s. 5.

Ruggles, contra, moved to enter a suggestion on record, that the demands of the parties, proved at the trial, exceeded \$400; and that costs be allowed the plaintiff. He said, the case comes within the 1st section of the \$50 dollar act. The 1st section of the 25 dollar act denies jurisdiction to a Justice where the demands of the parties exceed \$200; and the 5th section of the act concerning costs, (1 R. L. 344,) accordingly, gives the plaintiff costs in the Common Pleas, when the accounts between the parties exceed that sum, and the plaintiff's demand is reduced by payments or discounts to less than 25 dollars. The 1st section of the 50 dollar act, denies jurisdiction to the Justice, where the accounts of the parties exceed \$400. Under the 5th section of the act concerning costs, the plaintiff was confined to the Common Pleas; but this is virtually repealed by the 5th section of the 50 dollar act. This section provides that if the plaintiff, in any Court of Record, recover less than 50 dollars, he shall not recover costs, if the suit might have been brought before a Justice. It may be contended, that the case is not within the 4th section of the act concerning costs. (1 R. L. 344.) But that never was intended of a case, which was not cognizable before a Justice; otherwise there would be instances, in which, though a Justice has no jurisdiction, the plaintiff can have no costs in any other Court. The statute should be so construed, as to avoid this absurdity. Wherever a justice has no jurisdiction, the Court will give costs, and by a corresponding rule of construction, will deny them when the Justice has jurisdiction. These

are rules, which this Court has frequently acted upon, in suits against attorneys. (*Varian v. Ogilvie*, 3 John. Rep. 450. *Moulton v. Hubbard*, 6 id. 332. *Bailey's Case*, 1 John. Cas. 32. *Willot v. Star*, 8 John. Rep. 123. *Walsh v. Sackrider*, 7 id. 537. *Foster v. Garnsey*, 13 id. 465.)

ALBANY,
October, 1823

Abernathy
v.
Abernathy

Sudam, in support of his own motion, and in reply to Mr. *Ruggles*. The inquiry is, simply, whether a plaintiff, recovering 50 dollars only, in this Court, is entitled to his costs. No question can arise upon the *proviso* in the 1st section of the 25 or 50 dollar acts. The provisions of the two acts are in *pari materia*, and no doubt, the latter must bear the same construction, as to costs, where \$400 are involved, as the former, where \$200 were in question. In each case, the Justice is without jurisdiction, but the plaintiff must go to the Common Pleas. Will the Court make a difference between the cases, by saying that the 5th section of the 50 dollar act impliedly repeals the 4th section of the statute of costs? There is nothing like a repeal of the latter section, and in this Court, the plaintiff must still pay costs, according to its provisions. The 5th section of the 50 dollar act has contributed to vary the rule of costs in the Common Pleas only. Where the plaintiff, in that Court, now recovers more than 25, but less than 50 dollars, though he has no costs, neither does he pay costs to the defendant. Such I understand to have been the decision of this Court—a decision, which presupposes the 5th section of the statute of costs in full force, and without interfering with the 4th section of that statute, gives the proper effect to the 5th section of the 50 dollar act. The phraseology, in the 5th section of both these statutes, shows, that the one in the 50 dollar act was passed in reference to the one in the statute of costs. In the latter, it is, that the plaintiff shall not recover any costs, but shall pay costs. In the former, he shall not recover any costs; but it does not compel him to pay any. Thus all these provisions stand together, each having a different effect, according to the several objects for which they were passed. The plaintiff seeks costs upon a constructive right to them, but his title cannot be allowed on this ground. He

ALBANY,
October 1828.

Abernathy
v.
Abernathy.

must show an express provision. Statutes giving costs are penal, and cannot be extended by construction. (Bac. Ab Statute, (L) p. 390. 2 Dual. Pr. 710.)

Ruggles, in reply. The distinction, which would confine the plaintiff to the Court of Common Pleas, in order to avoid paying costs, is not well founded. The 5th section of the 50 dollar act provides for the cases excepted in the 5th section of the statute of costs, and evidently means to give the plaintiff costs, when he recovers any thing in a Court of Record; provided, the action could not have been brought in a Justice's Court. It contains a provision, in this respect, inconsistent with the 4th section of the statute of costs, and so far is a repeal of that section. Thus taken out of the operation of the 4th section, the case comes within the first section of the same statute which gives costs to the plaintiff, whenever he recovers any thing.

Curia. On looking into the case, we find it unnecessary to determine, whether, within the several statutory provisions, examined on the argument, the plaintiff would have been entitled to costs, had his claim been reduced to 50 dollars, by reason of payment, discount or set off. The 600 dollar note was not produced by way of set off, and the \$200 note was merged in the one of \$600, which was admitted to have been settled and paid; so that, in truth, the recovery was a balance, upon the notes of \$39 50 and \$28, which the plaintiff recovered, after deducting the set off of \$24 dollars for board. The three last claims, alone, were in question upon the trial. The only ground on which it was contended, that a Justice wanted jurisdiction, was, that the demands of both parties exceeded \$400. This is answered by its turning out, that the two large notes were not subsisting demands, and constituted no part of the amount between the parties. This brings the amount in controversy, below 100 dollars. The account intended, by the statute must be subsisting, unliquidated accounts. So far as they have been settled, and a balance struck upon them, that balance can alone be properly considered the account between the parties. The case is clearly with.

in the 4th section of the statute concerning costs. The plaintiff can take nothing by his motion, which is denied with costs; and the motion, in behalf of the defendant, is granted with costs.

ALBANY,
October, 1823

Roe
v
Martin.

Rule accordingly.

PALMER against EVERTSON.

ON certiorari to a Justice's Court. The action was assumpsit in the Court below, by Palmer against Evertson. Plea, the general issue; and that the suit should have been brought against the defendant and others as partners.

A plea in abatement, e. g. non-joinder of others as defendants, cannot be received after a plea in bar, e. g. the general issue.

On trial, a verdict and judgment were given for the defendant; and one question here was, whether the non-joinder of others could be pleaded after the general issue.

L. Maison, for the plaintiff in error.

N. P. Tallmadge, contra.

Curia. It should have been pleaded in abatement, and consequently came too late after a plea of the general issue. (Per Kenyon, Ch. J. 6 T. R. 770. Laws on Pleading, 108. Cas. Temp. Hardw. 135. 1 Mass. Rep. 358. 1 John. Cas. 101, 2.)

Judgment reversed.

ROE against MARTIN.

ON certiorari to a Justice's Court. One question was, whether the evidence, in the Court below, sustained the action. It was assumpsit, by Martin against Roe, for keeping the mare of the latter. It appeared that the plaintiff agreed

If the vendee leave goods with the vendor after contract of sale executed,

the law implies a promise by the vendee to pay the expenses of keeping them.

ALBANY,
October, 1823.

Legg
v.
Stillman

to exchange his mare for the defendant's horse. The plaintiff received a delivery of the horse, and the defendant agreed to take the mare from the plaintiff's residence, the next morning, which was not done; but she had remained with the plaintiff for a time, and had been kept by him. Verdict and judgment for the plaintiff.

N. Evertson, for the plaintiff in error.

A. Dimmick, contra.

Curia. The contract of exchange was complete. The mare became the property of Roe. And as he suffered her to remain at Martin's, after the time, when he was to have taken her away, the law implies an assumpsit, on his part, to pay for the keeping.

Judgment affirmed.

LEGG against STILLMAN and others.

The return of a summons in a justice's court, personally served, and stating the time when, is sufficient.

ON certiorari to a Justice's Court. The suit was by summons in the Court below, by Stillman and others against Legg, and the constable returned the summons thus: "Personally served, May 14th, 1822. Fees \$0 13. Thomas McKnight, const." The return was objected to as insufficient but the objection was overruled by the Justice.

H. Stephens, for the plaintiff in error.

N. Dayton, contra.

Curia. In *Wheeler v. Lampman*, (14 John. 481,) it was decided, that the constable must state the manner and time of the service, and both are required by the statute. (1 R. L. 388, s. 2.) The time is material, that it may appear whether the service was made six days before the return day; but there is no dispute about the sufficiency of the return under consideration, in this respect. The manner is

state very briefly—"personally." This mode is, we think, justified by the act, which, in the section cited, recognizes a summons served by reading it to the defendant, &c., as *personally served*.

ALBANY,
October, 1823.

Sprague
v.
Birdsall.

Judgment affirmed.

SPRAGUE *against* BIRDSALL.

ON certiorari to a Justice's Court. Assumpsit in the Court below, by Birdsall against Sprague, for money had and received. The plaintiff crossed Cayuga Lake on the ice, with his own sleigh. He commenced crossing within about 6 miles of the Cayuga Bridge, and crossed in a direction which brought him off of the lake within about 60 rods of the bridge. The defendant, who was toll gatherer at the bridge, demanded 25 cents toll of the plaintiff, which he paid. Verdict and judgment for the plaintiff for 25 cents, with costs.

The amendment to the act to incorporate the Cayuga bridge company, provides that it shall not be lawful for any person to cross the lake within three miles of the bridge, without paying toll; *held*, that embarking upon one side of the lake, six miles from the bridge, and crossing in such a direction as to leave the lake within 60 rods of the bridge, on other side, is not such a crossing within the three miles, as is contemplated by the act.

L. F. Stevens, for the plaintiff in error.

J. Clarke, contra.

Curia, per SAVAGE, Ch. J. The Cayuga Bridge Company was incorporated March 28, 1797, to continue for 25 years. On the 1st March, 1799, the act of incorporation was amended. The duration of the company was extended to 75 years; and the 2d section enacts that it shall not be lawful for any person or persons to erect any bridge, or establish any ferry or ferries, within 3 miles of the place where the bridge shall be erected by the company; neither

The act further provides, that any person may pass with his own boat, within three miles; *held*, that any one may cross in his sleigh, on the ice, within the principle of this proviso, and according to the general intent of the act, which is, that all persons who are compelled to resort to others, to assist them in passing, should cross the bridge; otherwise, as to those who have the means of passing independent of the bridge.

Yet, where one crosses the lake in such a manner as not to subject himself to the payment of toll, but on its being demanded, voluntarily pays it, he cannot maintain an action to recover it back.

A penal statute should be strictly construed.

So of a statute in favor of corporations or particular persons, and in derogation of common right.

They should not be extended beyond their express words, or their clear import.

ALBANY,
October, 1898.

Sprague
v.
Birdsall.

shall it be lawful for any person or persons to cross the lake after the bridge is completed, within 3 miles thereof, without paying to the corporation, for their use, the toll established by law; but it shall and may be lawful for any person or persons to pass and re-pass with his or their own boat, without being subject to the toll."

Two questions are raised: 1. Whether the plaintiff below crossed the lake within the 3 miles, as intended by the act. 2. If so, whether crossing on the ice subjects him to the payment of toll.

The act confers upon the company certain privileges, and restrains the rights of the citizen. It is, in a measure, penal; and ought to be strictly construed. In the construction of statutes made in favor of corporations or particular persons, and in derogation of common right, care should be taken not to extend them beyond their express words or their clear import. (*Coolidge v. Williams*, 4 Mass. Rep. 145. *Melody v. Rees*, id. 473.) They cannot take away a common law right, unless the intention is manifest; and, when not remedial, are not to be extended even by equitable principles. (Id.)

1. I cannot suppose the legislature contemplated such a crossing as this. Birdsall appears to have entered upon the lake more than 6 miles below the bridge; and could not have intended an infringement of the corporation rights. He does not fall within the language of the act, nor, in my opinion, is he within the reason of it.

2. By the *proviso*, every person is at liberty to cross in his own boat, within the 3 miles. The object of the legislature seems to have been, that all persons who were compelled to resort to others to assist them in crossing, should cross upon the bridge, and pay toll accordingly. But I cannot believe they intended to compel those who had the means of crossing independent of the bridge, to cross on the bridge, and pay toll. The principle contained in the *proviso*, negatives that idea. Can any man, then, be compelled to pay toll who crosses on the ice? I think not. He indeed comes within the language of the enacting clause; but he also falls within the principle of the *proviso*. The means of crossing are furnished him without the aid of the company. There

is no equivalent on their part, and I think he should not be compelled to pay.

ALBANY,
October, 1823

It is said, the act of April 18th, 1815, (sess. 38, ch. 233, s. 1,) affords a legislative construction, by providing "that the agents of the United States shall have the right to transport all military stores across the Cayuga lake in boats or on the ice." It is a sufficient answer, that an act in affirmance of a common law right, does not affect the right, nor raise a doubt as to its previous existence. If I am correct, they had that right before the act.

Pixley
v.
Butts

But the money was, in this instance, voluntarily paid. The plaintiff below, instead of paying upon demand, should have suffered a prosecution. The rule, *volenti non fit injuria*, is applicable; and for this reason, only, must the judgment be reversed.

Judgment reversed.

PIXLEY against BUTTS.

ON certiorari to a Justice's Court. Assumpsit in the Court below, by Butts against Pixley, for constable's fees. On the day of trial, one Jones offered to appear for Pixley, but was rejected, on the ground that he had no written authority. The plaintiff proved that he had an execution, issued by a Justice, in favor of the defendant, against one

A parol warrant of attorney, to appear in a justice's court is sufficient, and may be proved by the attorney himself.

A constable cannot recover his fees upon an execution, where he has levied upon property and returned that it remains on his hands for want of buyers.

To entitle him to his fees, he must levy the money, except where he is prevented by the act of the plaintiff, or by operation of law.

In the former case he may recover his fees, though he have levied only, and not sold.

He must levy and sell in due season.

If no bidders attend, he should postpone the sale, and give notice to the plaintiff, who should attend and bid himself.

And if he do not the constable will be excused in returning that the property remains on hand for want of buyers.

So he would be excused in making such a return, if he could not sell the property, but at a great sacrifice.

Yet after he has made such a return, he must proceed and sell, the first opportunity.

If he do not sell within thirty days, he loses his lien as against other executions.

The same rules of law, which govern sheriffs in the execution of process from the higher courts, govern constables in execution of a justice's process, except where some statute intervenes.

ALBANY,
October, 1823.

Pixley
v.
Butts.

Van Elton : that he levied on a cow of Van Elton, and advertised her for sale. At the day of sale, he offered the cow for sale, but though a number of persons attended, no one bid any thing. He, therefore, returned the execution to the Justice, stating that the cow was in his possession, unsold for want of bidders. The execution had nearly expired when the cow was put up for sale. Judgment for the plaintiff—damages \$1 38.

W. Platt, for the plaintiff in error.

E. Dana, contra.

Curia, per SAVAGE, Ch. J. Two objections are urged against this judgment. 1. The Justice refused to permit Jones to appear for the defendant. 2. The plaintiff was not entitled to the fees claimed.

1. We have frequently decided that a parol authority to appear for a party in a Justice's Court is sufficient, and that the person offering to appear is a competent witness to prove his own authority. (*Tullock v. Cunningham*, 1 Cowen, 256.)

2. The second point, however, is the most important, and I am of opinion the Justice erred in awarding to the constable his fees on the execution before he had completed the service. In *Hildreth v. Ellice*, (1 Caines, 192,) the Sheriff had levied on property of the defendant sufficient to satisfy the execution, but before sale the parties settled, and the Court held the Sheriff entitled to his fees. So in *Adams v. Hopkins*, (5 John. Rep. 252,) where the Sheriff had arrested a defendant upon a *ca. sa.* and he was afterwards discharged under the insolvent act. In the first case it was owing to the plaintiff's own act, that the Sheriff did not sell the property and collect the money : in the second, it was owing to the operation of law. The same point was decided in *Boswell v. Dingley*, (4 Mass. Rep. 413.) It is there said, by Parsons, Ch. J. "Could the officer have found estate of the debtor, he ought to have levied his fees, and thus have indemnified the defendant." These cases decide that the officer is entitled to his fees, when by the acts of the plaintiff, or the operation of law, he is prevented from collecting

the money. It may be asked, what should the constable have done? It might be time enough to answer that question, when Pixley sues Butts for not collecting the money, though I am willing to give my opinion upon it now.

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v.
Butts.

In *Clerk v. Withers*, (2 Ld. Raym. 1074,) it was decided by Holt, Ch. J. and the whole Court, that when the Sheriff has levied on sufficient goods of the defendant, the plaintiff has no further remedy; that the Sheriff must proceed and bring the money into Court; even if out of office he must sell the goods; and if he return that the goods remain on his hands *pro defectu emptorum*, this is no discharge, but only an excuse to the Court, and he must still go on and sell; even without a *venditioni exponas*. It is said by Ld. Mansfield, (Cowp. 406,) "The legal and proper mode of compelling a sale by the Sheriff, when he makes delay or refuses, is by writ of *venditioni exponas*, upon which he must return the money into Court." (3 Campb. 524, per Ld. Ellenborough, S. P.) In *Leader v. Danvers*, (1 B. & P. 359,) the Court refused an attachment against a Sheriff, on a return like the one under consideration, to a *venditioni exponas*, and said, if the plaintiff was dissatisfied with the return, he might set up a purchaser of the goods himself.

At common law, therefore, it seems to be settled, that either on a *fi. fa.* or *vend. exp.* it is the duty of the Sheriff to endeavor, to raise the money, by sale of the goods, as well after as before the return that the goods are on hand, &c., for want of buyers; that such return should be made when the goods cannot be sold unless at a great sacrifice; and if true it excuses the officer from liability to the plaintiff, and is not a contempt of the Court in neglecting to obey its process.

The conduct of constables, upon process from Justices' Courts, must be governed by the same law as that of Sheriffs upon process of the higher Courts, when there is no statute regulation. I am aware that the statute requires the constable to levy within 20, and to sell within 30 days; and this Court has decided that unless he do so, he loses his lien. (*Brown v. Hotchkiss*, 9 John. 361. *Wylie v. Hyde*, 13 John. 249.) But these cases relate to a contest between creditors, for the property of the same debtor. In such cases a great

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October, 1823.

Kelley
v.
Horton.

er degree of strictness is required, in Sheriffs on process from the higher Courts, than where the question is confined to the parties upon the record. (*Per Curiam in Linnendell v. Doe*, 14 John. 223.) In this case, the constable, having found sufficient goods of the defendant, could not have the execution renewed. (1 R. L. 393. *Wickham v. Miller*, 12 John. 320.) He should, therefore, under the execution first issued, have proceeded in due season to a sale. If no bidders had appeared, he might have postponed the sale, and given notice to the plaintiff to attend. I am of opinion that the judgment should be reversed.

Judgment reversed.

KELLEY *against* HORTON and SMITH.

Tho' a road be laid out, the overseer of highways has no right to open it, by removing fences, without an order from the commissioners, or a majority of them.

Nor have they a right to open a road which they have laid out, or direct it to be opened by removing fences, until after 60 days notice to the owner, to remove his fences.

And if fences are removed, to open a road newly laid out, without such notice, all persons concerned therein are trespassers.

ON certiorari to a Justice's Court. The action was trespass in the Court below, by Kelly against Horton & Smith, for pulling down the plaintiff's fence. Smith, as overseer of highways, and Horton, as coming in his aid, justified this, and proved by a witness, that he heard the plaintiff tell Smith, the overseer, that the former would open his fence when the latter wished to work the road. Verdict and judgment for the defendants.

G. Lawrence, for the plaintiff in error.

H. Baldwin, contra.

Curia. The testimony of the witness who heard the plaintiff tell the overseer that he would open his fence, when the latter wished to work the road, seems to admit that a road had been laid there; but by the 39th section of the act to regulate highways, (2 R. L. 283,) the plaintiff was entitled to 60 days notice from the commissioners, or a majority of them, to remove his fences; and the overseer had no right to open the road without their orders. The verdict is against law and evidence.

Judgment reversed.

ALBANY,
October, 1823Smith
v.
Fenton.SMITH *against* FENTON.

ON certiorari to a Justice's Court. Fenton sued Smith, in the Court below, and, after issue joined, the cause was twice adjourned, by consent. The second adjournment was under a stipulation of the defendant, that he would not delay the trial further, but would absolutely come to trial on the 17th Jan. 1823, the last adjourned day. On that day the parties appeared, and the defendant requested a further adjournment, offered security, and to make oath of the absence of two material witnesses, who had been subpoenaed by him, but did not attend; that without their testimony he could not proceed to trial, as he was advised by counsel; that one of them had gone a journey; that he expected to procure their attendance in two or three weeks. The Justice denied the adjournment. Judgment for the plaintiff.

A. Gregory, for the plaintiff in error.

Clark & Birdsall, contra.

Curia. The spirit of the 25 dollar act, and the adjudications of this Court upon it, appear to be, that the Justice has a discretion in granting adjournments after the first. One adjournment the defendant may claim as matter of right, on giving security, and making oath of the absence of a material witness. Others, he may be entitled to on showing sufficient cause; provided the 3 months have not expired. In this case the two first adjournments were by consent; and though the defendant might have been guilty of a violation of good faith, yet he offered to comply with the requisitions of the act. There had been no laches on his part; for he had subpoenaed his witnesses and they did not attend. We think the Justice ought to have granted the adjournment; though he seems to have acted under the impression that the defendant's object was delay and vexation. (*Easton v. Coe*, 2 John. Rep. 383. *Townsend v. Lee*, 3 id. 431. *Powers v. Lockwood*, 9 id. 133. *Beekman v. Wright*,

Though the cause have been twice adjourned by consent, and the last adjournment be under the defendant's stipulation that he will not delay the cause further; but will absolutely come to trial on the 2d adjourned day, yet the justice is bound to adjourn again on the defendant's giving security, and showing on oath, the absence of material testimony, &c., with due diligence used to obtain it.

The defendant is entitled to one adjournment of course, on making oath and giving security;

And, on showing cause he may have a still farther adjournment, provided the 3 months have not expired.

ALBANY,
October, 1823.

Lyon
v.
Munson.

11 id. 442. *Annin v. Chase*, 13 id. 462. Cowen's Treatise, 505 to 509, where all the cases upon this head are quoted.)

Judgment reversed.

WALES *against* HART & DOWD.

Where a constable is sued for selling property on execution, and judgment is in his favor, he is entitled to double costs;

Otherwise, where he is sued jointly with another and they plead jointly; tho' the judgment be in favor of both.

ON certiorari to a Justice's Court. Trover, in the Court below by Wales against Hart & Dowd. The defendants pleaded jointly the general issue; and the verdict was for the defendants. The defence was that the property in question belonged to one Davis against whom Hart, as constable, had an execution by virtue whereof he levied upon and sold the property to Dowd. The Justice gave judgment for the defendants, with double costs.

J. Birdsall, for the plaintiff in error.

Rexford, contra.

Curia. The defendant, Hart, would have been entitled to his double costs, had he pleaded separately: but joining with Dowd, the purchaser, single costs only were allowable. The judgment must be reversed, as to the costs.

Judgment accordingly.

LYON *against* MUNSON.

If a highway, or any part of it, be not opened

and worked within six years after the 19th March, 1813, it ceases to be a road; though it had been opened and worked before that time, and within 6 years after it had been laid out.

Accordingly, where a road had been laid out in 1798, and opened and worked within 6 years thereafter; but a part of it had been fenced up, and the travel turned another way for six years after, and including, the 19th March, 1813; *held*, that the part thus fenced, ceased to be a road;

And, consequently, that an action for the penalty of \$5, within the 25th section of the act to regulate highways, would not lie for continuing the fence.

the 25th section of the ' *act to regulate highways*,' (2 R. L. 270,) for obstructing a public highway in Oxford, Chenango county. Plea the general issue. The cause was tried by jury, Sept. 28th, 1822. The plaintiff produced the town record by which it appeared that the road was duly laid out, on survey, in the year 1798, beginning at the town line between Oxford and Greene, and running to Oxford village. It appeared also, by the same record, that an alteration was made, June 24th, 1800, by two commissioners of highways, in a part of the road from one point to another sufficiently explicit, but without an actual survey, and the certificate of alteration concluded thus: "N. B. The road from the place of beginning round by old Mr. Warn's, is hereby make void." The part of the road thus discontinued is that on which the pretended obstruction was placed by the erection of a gate. William Betts, a witness on the part of the plaintiff, proved that the old road passed through the farms of the plaintiff, of the defendant, and of Warn. That there had been fences across it on all the farms for a number of years. He understood the old road was to be discontinued when the new one was laid. Samuel Garnsey, another witness, said there was nothing in the petition about discontinuing the old road; that the north part of this road, at the defendant's, has had gates and bars, and the south part has had fences across it for 17 or 18 years. This witness did not understand that the old road was to have been discontinued. Abraham Hallenback testified, that when the new road was laid, he owned the farm now owned by the plaintiff. Before he put up the fences, he got the consent of his neighbours. The gates and bars were put up 3 or 4 years after the new road was laid. The old road has not been worked since the new one was laid. Verdict and judgment for the plaintiff.

ALBANY,
October, 1823

Lyon
v.
Munson.

H. Vanderlyn, for the plaintiff in error.

J. Tracy & Thorp, contra.

Curia. It is not necessary to inquire whether the act of the commissioners, in altering the old road, be valid within the provisions of the law under which they acted; for, if it

ALBANY,
October, 1893.

Walker
v.
Ames.

was void, the 23d section of the act which was passed March 19, 1813, (2 R. L. 277,) is, in our opinion, decisive of the question. It enacts, "that if any public highway already laid out, or hereafter to be laid out, shall not be opened and worked within six years after the passing of this act, or from the time of its being so laid out, the same shall cease to be a public highway or road, for any use, intent or purpose whatsoever." It is said the road was opened and worked, within six years after it was laid out. But the act is prospective. It speaks in the future tense. It requires that the road *shall be* opened and worked, &c.—not, *shall have been* opened and worked, &c. The clause, "or from the time of its being so laid out," refers to those roads only, *to be laid out* subsequent to the time at which the act passed. The road in question has not been worked within six years from that time. We think, therefore, it had ceased to be a road; and, consequently, that the judgment was erroneous, and should be reversed.

Judgment reversed.

WALKER *against* AMES.

Where one, by action, recovers money, which has been before paid, no action lies to recover it back;

And this though the first recovery be fraudulent.

ON certiorari to a Justice's Court. The action was case in the Court below, by Ames against Walker; "For that the defendant did fraudulently obtain a judgment, or a certain part thereof, against the present plaintiff, to his damage \$25." The defendant pleaded the former suit in bar, which was overruled by the Justice. The fraud complained of was, that Walker, in the suit against Ames, recovered on a book account, and also on a note given by Ames to Walker, on settlement of the same account for the balance thereof. Verdict and judgment for the plaintiff.

J. Root, for the plaintiff in error.

J. S. Sheldon, contra.

Curia. The judgment must be reversed. This was overhauling the first judgment, and attempting to recover back a portion of it, on the ground that it was not due, and had been unconscientiously recovered. The allegation of fraud does not alter the nature of the case. It is substantially an action to recover back money improperly awarded by a former judgment; and is precisely the case of *Marriott v. Hampton*, (7 T. R. 269.) In that case, the defendant had recovered against the plaintiff for goods sold. The plaintiff had paid him for these goods, and taken his receipt; but not being able to find the receipt, at the time of the trial, judgment went against him and he paid the money again. Afterwards, finding the receipt, he brought his action to recover it back. Lord Kenyon says, "if this action could be maintained, I know not what cause of action could ever be at rest. After a recovery by process of law, there must be an end of litigation; otherwise there would be no security for any person." The case of *Cobb v. Curtiss*, (8 John. 470,) is clearly distinguishable. There, the action was founded on an agreement to discontinue the first suit; and the Court go upon the ground, that this agreement could not have been set up as a defence to the second. There was nothing to prevent Ames' showing upon the first trial, that the note included the account. If he was not prepared with his proof it was his misfortune. There would, indeed, *be no end to litigation, nor any security to any person, if actions like this could be sustained.*

ALBANY,
October, 1823.

Beaver
v.
Van Every.

Judgment reversed.

BEAVER against VAN EVERY.

ON certiorari to a Justice's Court. The Justice permitted one Heermance to appear for Van Every, who was the plaintiff below. When this was objected to by the defendant, the Justice stated that the plaintiff, being sick and unable to attend himself, had sent for him the day before, and

A justice has no right to admit an attorney to appear upon his own knowledge of his authority.

ALBANY,
October, 1823.

Bullard
v.
Spoor.

requested him to permit Heermance to appear for him on the trial. He accordingly admitted him without any evidence of his authority, and gave judgment for the plaintiff

Myer & Van Buren, for the plaintiff in error.

Ruggles & Hasbrouck, contra.

Curia. The Justice had no right to decide from his own knowledge. He should have required the usual proof of an authority to appear. (*Burlingham v. Deyer*, 2 John. Rep. 189. *Rosekrans v. Van Antwerp*, 4 id. 228.)

Judgment reversed.

BULLARD & LORD against SPOOR.

In an action under the 50 dollar act, it is too late for the defendant to demand a jury of 12 men after a jury of 6 has been demanded by the plaintiff and a venire issued.

The justice may, on his own motion, challenge and set aside a juror for intoxication.

If neither party object, this silence concedes the fact of intoxication.

A justice may appoint a guardian *ad litem* for an infant; and

if the infant does not nominate a guardian, the justice may appoint such person as he shall think proper, on the motion of the plaintiff.

But this must be a real, not a fictitious person.

ON certiorari to a Justice's Court. Spoor sued Bullard & Lord, in the Court below under the 50 dollar act. On the parties appearing, the Justice requested Lord, who was an infant, to nominate a guardian *ad litem*, which he declined. The plaintiff then moved the Justice to appoint one for him, and he appointed John Doe, a fictitious person, to be his guardian. Issue was then joined, and the plaintiff demanded and had a venire for a jury of six. The cause was adjourned for two days, when the parties appeared, and the defendants then demanded a jury of 12 men. This the Justice overruled, and proceeded to draw a jury of six men. One of the jurors drawn was so intoxicated as to be unfit to serve; and the Justice gratuitously directed him to stand aside, to which neither party objected. Verdict and judgment for the plaintiff.

R. Cossit, for the plaintiffs in error.

W. M. Allen, contra.

Curia. The defendants were too late in demanding a jury of 12 men. The demand should have been made before any venire had issued. (*Strong v. Beardsley*, 18 John. 130.) The Justice was also right in refusing to permit a drunken man to serve on the jury. The fact of intoxication was conceded, by neither party objecting to his exclusion.

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October, 1823

Butts
v.
Swartwood.

The cause of *Mockey v. Grey*, (2 John. 192,) settles the principle, that a Justice has the power of appointing a guardian *ad litem* for an infant; and the only question is, whether such guardian must be a real person, or whether the duty to appoint is mere matter of form, and may be satisfied by the use of a fictitious name. We think the *guardian* must be a real person; (2 Sell. Pr. 68, Am. ed.) and that for this reason the judgment must be reversed.

Judgment reversed.

BUTTS *against* SWARTWOOD.

ON certiorari to a Justice's Court. The action was trover, in the Court below, by Swartwood against Butts, for a bureau, which the plaintiff had bespoken of one Piper, a cabinet maker. He paid Piper for the bureau while at his shop. Piper then, before it was trimmed and varnished, removed it to his house, and sent word to the plaintiff to come and take it away, as he feared it might be taken on an execution against him. The plaintiff accordingly came to Piper's took a delivery of the bureau, but requested him to let it remain in his house, until it was trimmed, and until the plaintiff could come with a sleigh for it. It was accordingly left at Piper's house, where the defendant, who was a constable, levied upon it as Piper's property, under a regular execution which he had against him, and afterwards sold it, though P. offered to turn out other property. Both Piper and the plaintiff gave the defendant notice that the bureau was the plaintiff's, who forbade the sale. The cause was tried by jury.

One who believes in the existence of a God, who will punish him if he swears falsely, is a competent witness.

Within this definition, a universalist, who believes future punishment not to be eternal, is a competent witness.

The non-delivery of property, on sale, is only one circumstance in proof of fraud, and may be explained.

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Butts
v.
Swartwood.

The plaintiff proved his case by Piper, who was objected to as incompetent, on the ground of his infidelity. A witness testified that he had heard him frequently declare, "that he did not believe in the Bible more than any other history; and that he would as soon swear by the uplifted hand as upon the book: but he at the same time declared that he believed in the Deity, and in the doctrine of universal salvation; and that he considered some part of the Bible as the word of God."

The Justice decided that he was a competent witness, and he was sworn and examined accordingly.

G. C. Edwards, for the plaintiff in error.

E. Dana, contra.

Curia, per SUTHERLAND, J. Two questions are presented: 1. Was Piper a competent witness? 2. Was the sale from him to Swartwood fraudulent, as being intended to defeat the execution in the hands of Butts?

The proper test of a witness' competency on the ground of his religious principles, is, "whether he believes in the existence of a God who will punish him if he swears falsely." (*Omichund v. Barker*, Willes, 549; *Jackson v. Gritley*, 18 John. 98.) There is no evidence in this case, to show what precise creed is embraced in the doctrine of universal salvation. But I do not understand all those who hold that doctrine, to deny all future punishment. Some only deny the duration of those punishments to be eternal. If this is a true exposition of their faith, then the witness comes within the rule. For aught that appears he believed in the existence of a God and a future state of rewards and punishments. He was, therefore properly admitted. (a)

(a) In some counties of this state, there are many persons belonging to that class of universalists who deny any future punishment of the wicked, after this life. In the Courts of Common Pleas and at Nisi Prius, in those counties, the question, as to their admissibility as witnesses, has been frequently agitated; but has never been distinctly brought before the Su-

The sale was not fraudulent. Piper swears expressly that he had other property sufficient to satisfy the execution

ALBANY,
October, 1823

Butts

F.
Swartwood.

præme Court for its decision. The following report of a case of that kind is from the manuscript notes of the Circuit Judge.

"THE PEOPLE against ZERUBABEL MATTESON.

THE defendant was indicted for perjury. On the trial, at the Court of Oyer and Terminer in Otsego county, in July, 1824, Raymond Williams, the prosecutor, was called as a witness on behalf of the people and was objected to, as incompetent, on the ground of his infidelity. A witness, for the defendant, testified that he had frequently heard the prosecutor declare, that *he did not believe in any future punishment, after this life.*

The question, as to the admissibility of the witness, was argued by the counsel for the defendant and by the public prosecutor.

WALWORTH, Circuit Judge, delivered the opinion of the Court. It is a legal presumption, that every person born and educated in a christian country, and who has arrived at years of discretion, is a competent witness, until the contrary is shown. It is, therefore, incumbent on the party objecting to such a witness, to show by clear and satisfactory proof that he is incompetent. Without such proof it will not be presumed that such a witness disbelieves in the existence of a God, or in that attribute of Divine justice which will, sooner or later, ensure the punishment of the guilty.

I apprehend the true test of the competency of a witness to be this: has the obligation of an oath any binding tie upon his conscience? Or in other words; does the witness believe in the existence of a God who will punish his perjury? If he swears falsely, does he believe he will be punished by an overruling Providence, either in this world or in the world to come? If he does not believe in the existence of a God; or if he believes in no punishment except by human laws, no obligation or tie can have any binding force upon his conscience. But if he believes that he will be punished by his God even in this world, if he swears falsely, there is a binding tie upon the conscience of the witness and he must be sworn; and the strength or weakness of that tie is only proper to be taken into consideration in deciding upon the degree of credit which is to be given to his testimony. It is a question as to his credibility and not as to his competency.

I am aware that, in the case of Gridley, the late Chief Justice Spencer lays down the law as clearly settled, that a witness must believe in a state of rewards and punishments *in the world to come*, or he is incompetent. If the question had been directly before the Court, in that case, I should consider this Court bound by the opinion of the Chief Justice, as being the decision of a higher tribunal, on this precise question. But, in that case, the witness had declared his total disbelief in the existence of a Supreme Being. He believed in no punishment by an overruling Providence in this life; and he believed that at death he would perish with the brutes. There could be no binding tie upon the conscience of such a witness, for he had no conscience. He considered himself, and was in fact, no better than a beast. That part of the opinion of Ch. J. Spencer which relates to

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which he offered to turn out, and which Butts refused to take, and no attempt was made at the trial to contradict him.

punishments in another world was, therefore, an *obiter dictum*; and wholly unnecessary to the decision of the cause then before the Court.

I should, notwithstanding, pay great deference to this opinion, as coming from the pen of such an able jurist, was I not satisfied he had fallen into the same error with many of the English writers, in relation to this question.

The foundation of all the error on this subject, both in this country and in England, was the misreporting of the opinion of Chief Justice Willes as delivered in the case of *Omichund v. Barker*, in February, 1743. This case was first reported by Atkyns, in 1765. In that report Ch. J. Willes is made to say, "I am clearly of opinion that if they do not believe in a God or future rewards and punishments, they ought not to be admitted as witnesses." And this expression as reported by Atkyns is referred to by most of the English writers in relation to this question. But Willes, in reality, did not say any such thing; but on the contrary expressly declared that, in his opinion, an infidel who believes a God and that he will reward and punish in this world, but disbelieves a future state, may be a witness. His opinion in *Omichund v. Barker*, was drawn out at length by himself, and was left among his other manuscript decisions; but it was not published till 1799, more than fifty years after it was delivered, when Willes' Reports were collected from the manuscripts of that learned Judge, by Mr. Charles Durnford.

In the opinion as written by himself, and correctly reported by Durnford in Willes' Reports, he says, "I am clearly of opinion that such infidels, if (any such there be) who either do not believe a God, or if they do, do not think that he will either reward or punish them *in this world or in the next*, cannot be witnesses in any case, nor under any circumstances; for this plain reason, because an oath cannot possibly be any tie or obligation upon them." It is somewhat remarkable that the rule of exclusion as laid down by Ch. J. Spencer in Gridley's case, is in the very language of Willes, except the leaving out of the words, "in this world or in the next," and substituting therefor, "in the world to come." To show that if there is any tie upon the conscience of the witness his infidelity goes to his credit, and not to his competency, in another part of his opinion Ch. J. Willes says—"Suppose an infidel who believes a God and that he will reward or punish him *in this world*, but does not believe a future state, be examined on oath, *as I think he may*; and on the other side to contradict him a christian is examined who believes a future state and that he shall be punished *in the next world as well as in this*, if he does not swear to the truth; I think that the same credit ought not to be given to the infidel as to the christian, because he is plainly not under so strong an obligation."

Such I understand to be the common law of England as it existed at the time of our revolution; and which, by the constitution, is made the law of

The purchase of Swartwood, therefore, could not have been with intent to defeat the execution. The question of fraud

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this state. And this is not a hasty opinion formed during the trial of this cause, but from having examined the subject heretofore. In this opinion I believe also I am supported by most if not all of the Circuit Judges.

There is nothing, in the case before the Court, to show that the creed of this witness is materially variant from that of a considerable class of the universalians, who believe in the existence of a God, in the authenticity of the scriptures, and in the divinity of the Saviour, but deny that there is any punishment for the wicked, after this life. Until the contrary is shown, we are bound to presume he believes in the existence of a God, who will punish the wicked, *in this life*. In the view I have taken of the subject, this would render him a competent witness; and as I have before observed, if his creed is any worse than this it is incumbent on the defendant to show that fact. And however much I may regret the existence of a creed which may jeopardize the future happiness of its possessor, the rules of law and rights of conscience must not be infringed. The witness must therefore be sworn, and the jury are the proper judges of his credibility.

E. B. Morehouse, (Dist. Att'y) for the People.

S. Starkweather, counsel for defendant."

The opinion of Ch. J. Willes, as reported by Dunford, is remarked by the reporter as having been taken from the original manuscript and in the Chief Justice's own words. See the preface to Willes' Reports, and the opinion at length commencing at the 540th page. The case in M'Nally is evidently copied from the report of the case by Atkyns; and Wooddeson refers to the same report. (3 Wood. 279.)

Lord Chancellor Hardwick says "all that is necessary to the validity of an oath is an appeal to the Supreme Being as thinking him the rewarder of truth and the avenger of falsehood. (1 Atkyns, 48.)

In that valuable work, entitled, *Introduction to the law relative to trials at Nisi Prius*; compiled by Mr. Bathurst, (afterwards Lord Apsley,) and republished, by the late Mr. Justice Buller, in 1772, the law is thus laid down: "Infidels cannot be witnesses; i. e. such who profess no religion that can bind their consciences to speak truth. But when any person professes a religion that will be a tie upon him, he shall be admitted as a witness, and sworn according to the ceremonies of his own religion. (Buller's N. P. 292.) Professor Wooddeson, speaking of the case of *Omickund v. Barker*, says, "two of the learned Judges expressed themselves, clearly, of opinion that a professed *atheist* could not be a witness." And the professor thereupon adds, "the case of men wholly without religion (if any such there be) may justly be thought a reasonable and lawful objection to bearing testimony in any cause or trial whatsoever. And this we may set down as the *first general exclusion*, from giving evidence known to our laws" (3 Wood. 282.) In 1818, the Supreme Court of Massachusetts de-

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depends upon the motive. The non-delivery of the bureau is only one circumstance in proof of fraud; and it is accounted for. (*Beals v. Guernsey*, 8 John. 446. *Wickham v. Miller*, 12 John. 320.)

Judgment affirmed.

cided that the disbelief of a witness, in a future state of existence, went only to his credibility and not to his competency. (*Hunecom v. Hunecom*, 15 Mass. Rep. 184. The Supreme Court of Errors in Connecticut, in 1809, decided, that a witness who did not believe in the obligation of an oath and a future state of rewards and punishments, or any accountability after death for his conduct, was by law excluded from being a witness. That it would be idle to administer an oath to a person who disregarded its obligation. But that every person who believes in the obligation of an oath, whatever may be his religious creed, whether Christian, Mahomedan or Pagan, or whether he disbelieves them all, may testify in a Court of Justice, being sworn according to that form of oath which, according to his creed, he holds to be obligatory. (*Curtis v. Strong*, 4 Duv's Rep. 55.)

By the "act concerning oaths," (1 R. L. 386, s. 15,) any person having conscientious scruples as to the mode of administering an oath, on the gospels, may, with his hand uplifted, swear by the ever-living God, and shall not be compelled to lay his hand on or kiss the gospels.

I am not aware that there is any case, either in this country or in England, where it has been expressly decided that a disbelief in a future state of rewards and punishments was, alone, sufficient to exclude a witness.

See further on this subject, as to the competency of witnesses, on the ground of infidelity, and as to the manner of proving it, Phillips' Evidence, 16 to 20; *Denn v. Vancleve*, (2 South. Rep. 652;) and the opinion of the Judges, in the Queen's case, (3 Broderip & Bingham, 284.)

TUTTLE against HUNT.

The plaintiff in a justice's court may serve his own summons, either where he is himself a constable or specially deputed for the purpose.

ON certiorari to a Justice's Court. The action was trover, in the Court below, by Hunt against Tuttle, for a quantity of wheat, which the plaintiff claimed to have levied upon, as a constable, under an execution. The suit was com-

Admitting evidence of a plaintiff's declaration in his own favor, if objected to, is fatal on error, though the court below direct the jury to disregard it.

menced by summons, which was served by the plaintiff himself, and returned thus: "Personally served, August 29th, 1822." Both the service and return were objected to as insufficient, but the objection was overruled. Issue being joined, the cause was tried by jury; and on the trial, the Justice allowed the plaintiff's declaration, that he had levied upon the wheat, to be given in evidence, tho' objected to, but after the evidence was given, he directed the jury not to regard it.

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October, 1822

Keyser
v.
Shaper.

R. Closset, for the plaintiff in error.

H. Baldwin, contra.

Curia. The service of the summons by the plaintiff himself was good. The rule adopted in *Bennet v. Fuller*, (4 John. Rep. 486,) is this: that where no bail is exacted the Sheriff may serve a *capias* in his own favor; and any other plaintiff may, under similar circumstances, be deputed to serve his own process. The return was sufficient (*Legg v. Stillman et al.* ante, 418.) But the error in admitting proof of the plaintiff's declaration is fatal, though the Justice directed the jury to disregard it. (*Penfield v. Carpenter*, 13 John. 350.)

Judgment reversed.

KEYSER *against* SHAPER.

On certiorari to a Justice's Court, Shaper declared against Keyser in the Court below, thus: "Plaintiff declares against the defendant for one barrel of salt, \$5; one note of hand—bal. of accounts for different kinds of liquors—claims \$50." To this declaration the defendant interposed a general demurrer. The plaintiff then discontinued, or entered a *nolle prosequi*, as to all the causes of action except the account for the salt, and joined in demurrer. Judgment for the plaintiff. The defendant contended, in the Court below, that the declaration was bad, because it contained neither time nor place, nor any request to pay for the salt.

A declaration in general indebitatus assumpsit in a justice's court is good, on general demurrer, though it contain neither time nor place, nor any request to pay.

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October, 1823.

Roberts
v.
Morgan.

D. F. Sacia, for the plaintiff in error.

A. Haring, contra.

Curia. The judgment must be affirmed.

Judgment affirmed.(a)

(a) In *Timmerman v. Morrison*, (14 John. 369,) objections similar to those overruled here, were allowed upon *special demurrer*.

ROBERTS *against* MORGAN.

In an action upon a warranty of a chattel, it is not necessary to prove that the word *warrant* was used.

Any affirmation amounting to a warranty is sufficient.

ON certiorari to a Justice's Court. Assumpsit by Morgan against Roberts, in the Court below, on a warranty of a horse upon an exchange of horses; and one question was whether a warranty was proved. The plaintiff told the defendant that he would not exchange, unless the defendant would warrant the horse to be sound, to which the defendant answered, "he is a sound horse except the bunch on his leg." The plaintiff gave proof tending to show that the horse had the glanders. Verdict and judgment for the plaintiff.

W. Crafts for the plaintiff in error.

J. Ruger, contra.

SAVAGE, Ch. J. in delivering the opinion of the Court, said there was no necessity to show that the word *warrant* was made use of. Any affirmation amounting to it is sufficient.

Judgment affirmed.

END OF OCTOBER TERM.

CASES
ARGUED AND DETERMINED
IN THE
S U P R E M E C O U R T
OF THE
STATE OF NEW YORK,

**IN FEBRUARY TERM, 1824, IN THE FORTY-EIGHTH YEAR OF OUR
INDEPENDENCE.**

SCHERMERHORN and CLUTE *against* MILLER and wife.

In partition. Schermerhorn and Clute, and Maria the wife of Miller, were seised in fee as tenants in common in equal shares of a house and lot in the city of Schenectady. Miller had issue by his wife, born alive. Proceedings were then commenced in partition, and this Court ordered a sale of the premises by the commissioners pursuant to the act, (1 R. L. 510, s. 5,) and on the 25th day of December, 1823, the premises were sold to Resolved Given, for \$344 50. Before this, on the 26th July, 1823, Given had purchased all the interest of Miller, at a Sheriff's sale upon execution, and taken a certificate as required by statute, (sess. 43, ch. 184, s. 1.) And now, (on proof, by affidavit, that notice of the motion had been given to Miller,)

Right of tenant by the curtesy initiate sold on execution.

By the seisin of the wife in fee, of one undivided third part of certain premises, and the birth of a child alive, the husband became tenant by the curtesy initiate: then his interest was sold to R. G. on execution: then the

whole premises were sold to R. G. under the statute of partition. On application by R. G. before the expiration of fifteen months from the first sale, the court ordered one-third of the proceeds of the sale to be put at interest by the clerk, to be disposed of by the court, at the expiration of the fifteen months, according to the rights of the parties at that time.

ALBANY,
Feb. 1824.

Philips
v.
Brainard.

A. C. Paige, moved for a rule, that the commissioners pay one-third of the \$344 50 to the Clerk, to be put at interest during the life of Miller, for the benefit of Given, the purchaser.

Curia. This application is warranted by the 14th section for the act for the partition of lands. (1 R. L. 513.) By the marriage and birth of the child, Miller became tenant by the curtesy *initiate*; and by the sale upon the execution, Given succeeded to his rights, and would be entitled, under the statute of partition, to the interest during Miller's life; but the period for redemption has not expired, and we cannot grant the rule as applied for. Let one-third of the proceeds of the sale by the commissioners be paid to the Clerk and be put at interest, which we will dispose of, on further application, when the period for redemption has expired, according to the rights of the parties at that time.

Rule accordingly.

PHILIPS *against* BRAINARD.

It is not essential, that affidavit for a *certiorari* to a Justice's court, state the verdict or judgment.

The omission may be supplied by an affidavit made after the thirty days.

The 90 days, within which the affidavit is to be laid before the judge for allowance are computed from the time of making the affidavit.

J. A. SPENCER, moved to set aside a writ of *certiorari* to a Justice's Court. The affidavit, on which the *certiorari* was founded, detailed the facts so as to exhibit the errors relied upon, but omitted to state the verdict or judgment. The *jurat* was dated August 9th, 1823, and on the 4th November thereafter the defendant below made another affidavit stating the verdict and judgment, and the *certiorari* was laid before the Hon. N. WILLIAMS, Circuit Judge, and allowed on that day. Judgment was, in fact, rendered July 11, 1823.

Spencer made two points: 1. That the affidavit showing the verdict and judgment, though of the substance of the affidavit on which the *certiorari* was allowed, was not made within 30 days; and 2. That the affidavit was not laid before the Circuit Judge within 90 days after the judgment. He

cited *Dickson v. Selye*, (6 John. Rep. 326,) and *Clark v. Lawrence*, (1 Cowen, 48,) and 1 R. L. 396.

ALBANY,
Feb. 1894.

Phillips
v.
Brainerd.

J. Platt, contra, said, the verdict and judgment are not a material part of the proceedings. The 17th section of the act, (1 R. L. 396,) provides, that the party applying for the *certiorari* shall, within 30 days after the judgment, make affidavit, satisfying the officer who allows the writ, that there is reasonable cause for granting it, for error in the judgment, which shall be specified in the affidavit; and within 90 days thereafter cause the affidavit to be presented to the officer. Where the affidavit discloses material errors in the pleadings or proofs, the legislature never could have intended that the mere formal statement of the verdict or judgment should be essential. There is no use in such a statement. The very application for a *certiorari* is an averment that there is a judgment of some sort. If at all material the 6th of Johnson's Reports, cited on the other side, presents a class of cases, in which the present is included, allowing a supplemental affidavit, to supply the defect, after the thirty days. The 90 days are to be computed from the time of taking the affidavit—not the rendition of the judgment.

Curia. We are clearly with you that the affidavit was presented to the Judge in proper season. The only question is, whether the supplemental affidavit was admissible.

Spencer, in reply. By the statute, the officer allowing the *certiorari* is to be satisfied by affidavit showing for cause that there is *error in the judgment*. These are the very terms of the statute. The affidavit must necessarily show a judgment, before it can point out the errors which it contains. The judgment is a part of the merits on which the writ is founded. *Dickson v. Selye* settles this question. The Court say, in that case, that every thing relating to the merits must be stated in the affidavit which is made within the 30 days.

Curia. The only question is, whether the Judge was warranted in receiving the supplemental affidavit. We think the mere omission to state the judgment might be supplied

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Jackson
v.
Lytle.

by an affidavit made after the 30 days. There was no error complained of in the judgment itself. The party stated all which he relied upon for error within the 30 days, which was a substantial compliance with the statute.

Motion denied.

JACKSON, *ex dem.* PRINDLE and PRINDLE, *against* STILES,
LYTLE, tenant.

The lessor in ejectment is not bound, of course, to enter into special consent rule, but only on application to the court.

Form of a special consent rule by tenant in common, and of rule for leave to enter into it.

THE defendant made an affidavit thus: "That no actual ouster of the lessors of the above plaintiff, or either of them, has been committed by this deponent; and that he, this deponent, is advised by his counsel, and verily believes truly, that this ejectment may involve a question between tenants in common;" and his attorneys, instead of the common consent rule, drew up a special one, which after proceeding in the usual form to the words, "plead thereto not guilty," ran thus: "And upon the trial of the issue confess lease and entry, and also ouster of the nominal plaintiff, in case an actual ouster of the plaintiff's lessors, by the defendant, shall be proved at the trial, but not otherwise, and insist upon the title and such actual ouster only; otherwise let judgment be entered for the plaintiff against the now defendant John Stiles, by default; and if upon the trial of the said issue, the said David (the tenant,) shall not confess lease and entry, and also ouster upon the condition aforesaid, whereby the plaintiff shall not be able further to prosecute his bill against the said David, then no costs shall be allowed for not further prosecuting the same, but the said David shall pay costs to the said plaintiff in that case to be taxed. And it is further ordered, that if upon the trial of the said issue a verdict shall be given for the said David, or it shall happen that the plaintiff shall not further prosecute his said bill, for any other cause than for not confessing lease and entry and also ouster subject to the condition aforesaid, then," &c.

The defendant's attorney signed this special consent rule with a duplicate, and tendered it to the plaintiff's attorney, requesting him to join, at the same time delivering to him a copy of the above affidavit, and showing to him the original. The plaintiff's attorney refused to join in the rule.

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v.
Lytle.

Willard, now moved for leave to enter into a special consent rule as above drawn. He cited *Adams on Ejectment*, 236; *Jackson v. Denniston*, (4 John. Rep. 312) *Langendyck et ux. v. Burhans*, (11 John. 461,) 2 Archbold, 47. He said the lessors of the plaintiff ought also to pay the costs of this motion for not accepting the tenant's offer in the first instance.

S. Stevens, contra, cited *Oates v. Brydon*, (3 Burr. 1897,) *Jackson v. Lyons*, (18 John. 398,) and 7 Modern Rep. 39, per Holt, Ch. J.

Curia. If the plaintiff was bound to accept the special consent rule, he doubtless ought to pay costs. But we think he was not bound to do this. Entering into a special consent rule is not a matter of course, but should be on a special application to the Court; especially where the affidavit is so general and loose as the one which was served upon the plaintiff's attorney. We grant the application, without costs.

The following rule was entered:

"On, &c. ORDERED, that David L. Lytle, the tenant in possession of the premises in the declaration of ejectment mentioned, have leave to enter into a special consent rule, requiring him to confess *lease* and *entry* at the trial, but not *ouster* also, unless an *actual ouster* of the plaintiff's lessors, or one of them, by the said David, shall be proved."

ALBANY,
Feb. 1824

Boyce
↓
Russell.

In the matter of **BOYCE**, collector of **FORT ANN**, against
RUSSELL, treasurer of **WASHINGTON** county.

A town collector cannot pay moneys due from the county, and charge it in account with the latter.

A county treasurer, refusing to pay money, without cause, is liable to an action.

Mandamus does not lie where party has remedy by action.

STREETER having an unliquidated claim against the county of Washington, assigned it for a valuable consideration to **Doty**, who presented the claim to the board of supervisors and it was audited by them at \$193 95. **Doty**, at the same time, gave notice to the county treasurer and the supervisors, that he was the assignee. On the 6th Jan. 1823, he presented the account, as audited, to **Boyce**, the collector of Fort Ann, who paid it, and on the 11th Feb. 1824, in his settlement with **Russell**, the county treasurer, claimed to have a credit of this sum. It was credited accordingly, except 75 09, which the treasurer held to answer a certain order for that amount drawn on him by **Streeter** in favor of one **Harvey**, on the 16th of Sept. 1820. On these facts,

Willard moved for a mandamus, to compell **Russell** to credit the whole sum paid by **Boyce**.

Per Curiam. The town collector has no right to pay off claims upon the county in this manner. He must pay all the money which he collects to the county treasurer, except in those cases wherein he is otherwise directed by statute. **Doty** might have had his action against the treasurer had he refused to pay him without sufficient cause. The rule is, that when the party has a remedy by action, this Court will not interfere by mandamus. **Boyce** does not come for relief as a public officer; for he has travelled beyond the line of his duty; and we must regard his acts as those of any other individual.

Motion denied.

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Feb. 1824.The People
v.
Bradwell.

THE PEOPLE against BRADWELL.

CERTIORARI to the Court of Oyer and Terminer of the county of Washington. The defendant was indicted in the Court of General Sessions of the Peace, for feloniously passing several counterfeit bank bills. A Circuit Court, and Court of Oyer and Terminer, were duly appointed, to be holden at the Court house in the town of Salem, in the county of Washington, on the 1st Monday of January, 1824; on which day Judge WALWORTH appeared, and opened the Circuit Court, and proceeded to business therein; but neither of the county Judges arrived during that day. On the adjournment of the Circuit Court, on Monday evening the Circuit Judge discharged the grand jury, on the supposition that the Oyer and Terminer could not be adjourned by him, or be opened on a subsequent day. On Wednesday, WENDELL and SPRAGUE, two of the county Judges, appeared and took their seats; and the Oyer and Terminer was then opened, for the first time. The prisoner pleaded not guilty; and, on trial, the jury found a verdict of guilty. The counsel for the prisoner then moved in arrest of judgment, on the ground that the Court was irregularly holden, and had no power to try him. A majority of the Court of Oyer and Terminer decided the proceedings were regular, but at the suggestion of the Circuit Judge, who dissented from that opinion, they suspended the judgment and directed the District Attorney to remove the record into this Court, to the end that the question might be determined here.

A court of oyer and terminer cannot be adjourned by a circuit judge, or otherwise by reason that a number of the county judges sufficient to make a quorum are not present at the day appointed for holding it.

And where a quorum did not appear till the third day of the circuit, and then opened the oyer and terminer and convicted a criminal; *held*, that the proceeding was *coram non iudice*.

But the court, on certiorari, ordered a rule to set aside the proceedings so as to prevent any advantage by a plea of *auterfois convict*.

J. B. Lathrop, District Attorney. The number of Judges necessary to constitute a Court of Oyer and Terminer, did not arrive till Wednesday; and the only question is, whether the Bench of that Court must be full at the precise day appointed for holding the Court; or whether it be sufficient

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v.
Bradwell

if so at a subsequent day during the Circuit. The statute provides, that if the Circuit Judge shall not arrive at the day appointed, before 4 o'clock P. M. the Sheriff or Clerk may adjourn to 9 o'clock A. M. of the next day, and at any time before 8 P. M. of the 2d day, the Circuit Judge may open his Circuit, and a quorum of the Oyer and Terminer may open that Court; (sess. 46, c. 182, s. 8, 1 R. L. 337.) The 5th section of the act concerning the Supreme Court, (1 R. L. 319,) provides for adjourning that Court; and provision is also made by another statute for adjourning the Courts of Common Pleas. (2 R. L. 147, s. 7.) The statute (sess. 46, c. 182, s. 9,) authorizes a Court of Oyer and Terminer to be holden at the *time* and *place* of holding the Circuit. True, there is no express provision for adjourning the Oyer and Terminer, by reason of the absence of any of the Commissioners, other than the Circuit Judge. The legislature did not deem this necessary. They evidently consider the Court a kind of incident to the Circuit, an adjournment of which carries the Oyer and Terminer with it. This appears from their having provided for an adjournment of all the other Courts, without noticing the Oyer and Terminer. No notice of holding a Court of Oyer and Terminer need be published, though otherwise as to the Circuit Court; (sess. 46, ch. 182, s. 5;) nor can the Circuit Judge appoint the Oyer and Terminer at any other time than that of his Circuit. The power of appointing special Courts of Oyer and Terminer is reserved to the Governor and Senate. (Id. s. 9.)

J. Williams, for the prisoner. The case presents a Circuit Judge opening his Court on the first day of the Circuit, announcing that no Court of Oyer and Terminer can be holden for default of the other Commissioners, who appear two days after, overrule him, and proceed to the trial and conviction of the prisoner. The acts of 1813, and 1823, which have been cited, are the same in substance, so far as they relate to adjournments. The Court of Oyer and Terminer which has existed for centuries, and exercised the most important powers, is not very aptly considered a

mere incident to the Circuit. But suppose it to be so, it was then dismissed by adjourning the Circuit from day to day, without noticing or continuing the Oyer and Terminer. The position on the other side, would place that Court entirely under the control of the Circuit Judge; and in this, be inconsistent with that part of the act which makes Judges of the county Court Commissioners. It is admitted that the statute contains no express provision for adjournment; and if there is an implied right to adjourn, it was not exerted. If a Court is not holden on the day fixed by law, it has no jurisdiction. This is so considered by the statute, which carefully provides for adjourning all the other Courts.

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Lathrop, in reply, said that no evil could arise, from considering both Courts continued. The Oyer and Terminer cannot be holden except during the Circuit, and the jurors who are returned for this Court are to act as jurors of the Oyer and Terminer. This is another feature in the statute showing an intention to make the Oyer and Terminer merely incidental to the Circuit.

Curia. There is no express provision, in the statute, for adjourning in a case like the present; and we think there is no implied power to adjourn. The proceedings of the Judges were *coram non judice*, and void; and we advise that the prisoner be arraigned, plead, *de novo*, and be tried at the next Oyer and Terminer for Washington county.

Lathrop, suggested that as the record was, he might be embarrassed, on bringing up the prisoner at the next Oyer and Terminer, by a plea of *auterfois convict*, and submitted whether the Court would not direct a rule to be entered, setting aside the proceedings; and THE COURT directed the Clerk to enter a

Rule accordingly.

ALBANY,
Feb 1834.

Cleveland
v.
Strong.

CLEVELAND against STRONG.

The affidavit for a reference need not state where the venue is laid.

A. SAMPSON, moved for a reference in this cause.

S. M. Hopkins, contra, objected that the affidavit on which the motion was founded, did not state where the venue is laid. He cited *Sherwood v. Tremper*, (11 John 406.)

WOODWORTH, J. I think it should appear by the affidavit in what county the venue is laid; otherwise we cannot see that the referees reside there, which is necessary, by the case cited. I believe the practice has been to state the venue.

SUTHERLAND, J. I do not see why this should be deemed necessary in the first instance. It is true, that by the case cited, the referees must reside in the county where the venue is laid; but if the referees named in the notice do not, in fact, reside there, it seems to me to be more properly matter of objection for the other side.

SAVAGE, Ch. J. The great object is to have an established and uniform rule on this subject. The practice heretofore seems to have been to state the venue in the affidavit on which the motion is founded; and I see, at present, no good reason for departing from that practice.

THE COURT, afterwards, mentioned that they had considered further of the practice, and they thought it unnecessary to state the venue, in the affidavit.

Motion granted.

ALBANY,
Feb. 1834.Emmet
v
Bradstreet.

EMMET against BRADSTREET.

AT the last term, on affidavits that a *capias ad respondendum* had issued without an *ac etiam*, on which the defendant had been arrested but refused to endorse her appearance, and on motion in behalf of the plaintiff, a rule was obtained that she show cause at this term why she should not file common bail, or that the plaintiff have leave to file it for her.

S. A. Foot, for the motion.

A. L. Tillinghast & Talcott, (Attorney General,) now showed cause. They read affidavits by which it appeared that the defendant has been arrested in the county of Delaware, and that she offered to procure special bail or go to jail, but refused to endorse her appearance on the *capias*; and the Sheriff of that county, after detaining her in custody for a day or two, suffered her to go at large. She had been arrested by a special deputy who was deputed to serve the process, at the risk and request of the plaintiff; but after the arrest he delivered her over into the personal custody of the Sheriff. The Sheriff returned the *capias*, *cepi corpus*.

They remarked that the form of the process in this Court was brought over from the K. B. which originally had cognizance of no actions except those for breaches of the peace. Other actions belonged to the Common Pleas. Ultimately, however, the K. B. allowed arrests of any one upon their process for trespass, and on being brought into Court, the plaintiff might declare in what action he pleased; and there was no provision that the Sheriff should let the defendant go at large upon his giving sureties. Then came the statute (Hen. 6. c. 10,) allowing bail in certain cases; but it could not be executed in relation to the process of the K. B. because that did not always specify the true cause of action. Hence the statute (13 Car. 2, st. 2, c. 2,) which provided that the Sheriff should have no power to exact bail

Arrest on
process not
bailable.

The sheriff
arrested the
defendant on a
cap. ad resp.
not bailable,
and on her re-
fusing to en-
dorse her ap-
pearance, he
suffered her to
go at large,
and returned
cepi corpus;
and, on motion
in his behalf
the court or-
dered common
bail filed.

ALBANY,
Feb. 1824.

Emmet
v.
Bradstreet.

except where the cause of action should be truly expressed in the process. To satisfy this statute, the *ac etiam* was introduced. It was adopted by this Court, and our statutes on this subject are similar to those of England. (1 R. L. 423, 4.) By the 13th section, the Sheriff is required to let out on bail all persons arrested by him on process in any personal action. By the 14th section, if the true cause of action is not expressed in the process, the Sheriff is to let the defendant out of custody on his endorsing an appearance. Without the last section, the Sheriff would have been bound to let the defendant out of custody, on her giving bail. This section, requiring an appearance only to be endorsed, was intended for the personal benefit of the defendant; and the party may, notwithstanding, waive that benefit, and give bail, or go to jail. She had an election out of three courses: to give special bail, to endorse her appearance, or to go to jail. There are particular modes of proceeding against prisoners, which the defendant might have wished to avail herself of. The plaintiff has no right to complain. The writ was served by a special deputy, appointed at his risk, and on his request. As to the Sheriff, he voluntarily permitted the defendant to go at large; and he comes here with an ill grace to ask the favor of being saved from a suit for this wilful neglect. He is without excuse, for the defendant was willing, and offered to go to jail. In England, the Court will grant the Sheriff no favor, where he has voluntarily suffered the defendant to go at large without bail. (*Fuller v. Prest*, 7 T. R. 109. *The King v. Sheriff of Surry*, id. 239.) The difficulty was, in this case, incurred by his own refusal to take bail, or his voluntary neglect to carry the defendant to jail. Our statute in relation to the right of the plaintiff to file common bail, is the reverse of the English. With us the plaintiff can appear for the defendant only when special bail is required. (1 R. L. 324.) Nothing appears, to show that the Sheriff is not perfectly responsible. Let the plaintiff take his remedy against him.

[SUTHERLAND, J. But suppose the Sheriff to have misconceived his duty, ought we not to relieve him by setting

the proceedings right in point of form, where no possible injury can arise to the defendant?]

ALBANY,
Feb. 1824.

Emmet
v.
Bradstreet.

There is no pretence but that other process may be served on the defendant. Here is no misapprehension of duty alleged. It is not pretended that the Sheriff did not know he could carry the defendant to jail, and detain her till she endorsed an appearance. In reality, it is a voluntary escape.

[WOODWORTH, J. If a bail bond had been given, could the plaintiff have required special bail? If not, then the entering an appearance now, is doing precisely what the defendant might have done, had the Sheriff acceded to the offer of a bail bond. I apprehend that entering an appearance with the Clerk would have fulfilled the condition of the bail bond, taken under these circumstances.

SUTHERLAND, J. I am not prepared to say that because an obstinate old woman refuses to endorse her appearance, the Sheriff is bound to take her to jail. If he prefer letting her go, and comes here for relief, in a case where she cannot possibly be prejudiced, I see no good reason why we should not order an appearance to be entered.

SAVAGE, Ch. J. What injury can possibly arise to the defendant from this rule? I do not see what object there is in opposing it.]

We do not wish to pay the costs of these proceedings. They were irregular from the first; and the expense should fall upon the one who committed the irregularity.

[WOODWORTH, J. The defendant offered to give bail to the Sheriff, which was refused. The Sheriff took a course which was less rigid, than the one offered. It seems to me, that to deny this rule would be to allow *form* to prevail over *substance*.]

Though the Sheriff let the defendant out of custody without bail, if he have her at the return of the writ, it is enough;

ALBANY,
Feb. 1884.

Sherman
v.
McNitt.

but the Courts will hold him strictly to his duty. The Sheriff should have retaken the defendant. The letting a defendant go without taking bail, is not such a voluntary escape as will prevent the Sheriff from retaking him, and having his body at the return of the process. (Per Ashurst, J. in 7 T. R. 239.)

WOODWORTH, J. I think it inferable from the circumstances of this case that the Sheriff misconceived the precise line of conduct which he had a right to pursue in order to compel the endorsement of an appearance.

Rule absolute.

SHERMAN, by his guardian E. SMITH, *against* JAMES McNITT.

One of several causes in favor of the same plaintiff, and involving the same defence, was tried, and verdict for defendant. The plaintiff declined trying the other causes, and made a case in the one tried; and the Court denied the motion for judgment as in case of nonsuit in the others.

But to avoid paying the costs which accrue in the others subsequent to the trial of the first, the plaintiff should apprise the defendants of his intention not to try.

INGALLS moved for judgment as in case of nonsuit, on the usual affidavit that this cause had been noticed for trial at the last Washington Circuit, where the venue was laid, but though called in its place on the calendar was not tried.

S. Stevens, contra, read an affidavit of the plaintiff's attorney in these words: "That a cause in favor of the above plaintiff against one James Wilson, of the same nature, and for the same cause of action, and in which the same defence was pleaded as in this cause, was tried at the last Circuit in Washington county, and a verdict was found for the defendant; that a case has been made in said cause, and is noticed for argument at the present term of this Court; that when the verdict in the said cause against Wilson was given, this deponent in *the presence and hearing of the defendant's counsel*, (a)

(a) This is material in relation to costs. At this term in *Jackson ex. dem Bridgen et al. v. Van Woert*, and *The Same v. The Same*,

J. L. Vicks, moved for judgment as in case of nonsuit.

G. W. Kirtland, contra, opposed on ground similar to that taken in the

declined trying this cause before he could get the opinion of the Supreme Court as to the sufficiency of the defence set up in the said cause which had been tried, as the defence in each cause was the same; *that the defence in this cause depends precisely upon the same question as the defence in the said cause against the said Wilson, which was tried.*"

ALBANY,
Feb. 1824.

Bradstreet
v.
Phelps

The Court, were inclined to grant the motion, at first, for want of the last sentence of the affidavit, which is in italics; but on this being added by the plaintiff's attorney, they were clear for denying the motion with costs.

Motion denied.

principal cause, but it not appearing that the plaintiff's attorney or counsel gave notice to the defendant's attorney or counsel, that he should not try the cause depending on the same point with the one tried, the court, though they denied the defendant's motion, ordered the plaintiff to pay the costs of the attendance of the defendant's witnesses, at the Circuit, from the close of the first trial, until the Circuit adjourned.

BRADSTREET against PHELPS.

SUDAM moved for an attachment against the defendant, for non-payment of costs. He produced an original rule in this cause, of the last October term, as follows: "On motion on the part of the defendant in this cause, for judgment as in case of nonsuit, and after hearing counsel for both parties, ordered that the same be denied with costs"—a taxed bill of costs; and an affidavit of E. W. that on the 11th Feb. 1824, he delivered to the defendant copies of the rule and taxed bill, and at the same time showed him the original, and de-

How costs are to be obtained, when a rule orders them to be paid.

The original rule was shown to the party who was ordered to pay with a taxed bill of the costs, copies of both delivered

to him and demand made of the costs, which he refused to pay.

The party, in such a case, is not allowed 20 days within which to pay the costs.

Twenty days are allowed only where the plaintiff is allowed to stipulate to try his cause on payment of costs.

Form of the power from the attorney to demand costs.

ALBANY,
Feb. 1824.

Oakley
v.
Becker.

manded the costs, which he neglected to pay. The demand was made pursuant to a power of attorney, (signed by the defendant's attorneys,) in these words: "We hereby authorize and empower E. W. to demand and receive the amount of the foregoing bill of costs of ten dollars and fifty one cents of A. P. Mr. P.'s payment of said sum to E. W. will be in full discharge of said costs. Feb. 9, 1824."

S. Sherwood, contra, relied on what was said by the Court in *Brooks v. Hunt*, (3 Caines' Rep. 95,) "that, in all cases, the period within which costs are to be paid is 20 days." These have not expired since the demand; and the motion for the attachment is premature.

Sudam, in reply. The rule as laid down in that case is too broad. It applies only to the plaintiff where he is allowed to stipulate, after a default in not bringing on his cause to trial at the Circuit, on payment of costs. (Reg. Gen. October term, 1802. *Witmore v. Russell*, 3 Caines' Rep. 135.) In all other cases the costs must be paid *instante*.

Curia. The defendant is mistaken in supposing he had 20 days after the demand within which to pay these costs. The rule upon which he relies does not apply to this case. It is confined to costs which are due from the plaintiff where he is allowed to stipulate to go to trial on payment of costs, upon the defendant's moving for judgment as in case of non-suit.

Rule granted.

OAKLEY against BECKER.

PECKHAM against THE SAME.

The plaintiff's attorney may, with the consent of the defendant, alter a *fi. fa.* after it is placed in the sheriff's hands, so as to make it correspond with the judgment record, without entering a rule for the purpose.

JUDGMENT for the plaintiff in each cause. A *fi. fa.* in favor of Peckham was delivered to the Sheriff April 29th, 1823, for \$1000 debt and \$15 25 costs; and afterwards the Sheriff

Though a *fi. fa.* be voidable for variance from the record, the defendant alone can move to set it aside.

A judgment creditor in another suit has no right to do this.

received another *fi. fa.* in favor of Oakley, for \$1454, debt, and \$16 34 costs. The Sheriff having sold the personal property of the defendant, and that not being sufficient to satisfy the executions.

ALBANY,
Feb. 1894.

Oakley
v.
Becker.

A. Vanderpoel moved that he apply the proceeds first to the satisfaction of the junior execution; and one ground which he took was, that after the senior execution was delivered to the Sheriff, the attorney for the plaintiff therein altered it, from \$15 25 to \$14 75, costs, so as to make it correspond with the judgment record. The attorney had sent the record of judgment, which was by confession, by mail to the Clerk's office with a bill of costs to be taxed, and without hearing from it, issued his *fi. fa.* supposing his bill had been taxed as he had made it out. Having been taxed at less, the alteration became necessary. The defendant did not consent to the alteration at the time it was made; but

Bushnel, contra, read an affidavit showing that he afterwards consented to it, in writing.

Vanderpoel. A writ cannot be altered in the Sheriff's hands by consent. There should have been a rule to amend.

[SUTHERLAND, J. But can a third person avail himself of this irregularity?

WOODWORTH, J. If the Sheriff had sold without any alteration, we should have amended the *fi. fa.* on the plaintiff's application.]

Vanderpoel. True, if this had been a mere mistake; but it is not so. The variance is owing to the party's own culpable precipitancy.

[WOODWORTH, J. I do not see how this variance can work any injury to you.]

ALBANY,
Feb. 1894.

Hammond
v.
Mather.

Vanderpoel. I am not aware that the Court have ever gone so far as to say that a third person cannot take advantage of such an irregularity.

[SUTHERLAND, J. It seems to me the defendant had a right to waive it at any time.]

Vanderpoel. I had supposed *Thompson v. Bristow*, (Earn. 205,) a direct authority in support of this application; or, at any rate, that the plaintiff can avoid the preference, which we claim, only by motion to amend, on payment of the costs of this motion.

The Court denied the motion with costs.

Motion denied.

HAMMOND and CAMPBELL against MATHER and MATHER.

Two writs of *fi. fa.* may issue on the same judgment, into different counties at the same time.

C. P. KIRKLAND, moved to set aside the *fi. fa.* in this cause which had issued against the defendants' property in the county of Otsego; and one ground which he took was, that a *fi. fa.* had previously issued in the same cause into the county of Herkimer, returnable at last October term, which had been levied on the defendants' property, and before the sale under the first, this *fi. fa.* was issued into Otsego, returnable at this term; so that there were two writs of *fi. fa.* running at the same time, in two different counties.

A. Conkling, contra, to show that this was correct practice, cited 2 Tidd, 912, 1 Archb. 216, 2 Dunl. 771.

Curia. The books of practice agree that this is regular.

Motion denied.

REMARKS,
Feb. 1861.

JACKSON, *ex dem.* CAREY and GOODALL, against STUPPEN.

Brown
v.
Osborne.

On motion for judgment as in case of nonsuit, for not going to trial at the Otsego Circuit, in September last, it was opposed on the ground that it had been the practice of the Circuit Judge in that county, at the former Circuits, to call over the calendar on the first day of the Circuit, but not to take it up in order till the second day; that such was the case at the last September Circuit, though the Judge did not declare that he intended to adopt the same practice as formerly; and the cause was not reached at the subsequent call.

H. Lathrop, for the motion.

L. Beardsley, contra.

Curia. We cannot recognize any such practice as is contended for. The Judge gave no intimation that the first call of the calendar was considered by him, merely informal or irregular. We must take it to have been the regular and ordinary call. It was the duty of the plaintiff to have been ready for trial, when his cause was first called.

Motion granted.

Where a cause is called on the calendar, at the first day of the circuit, but not reached afterwards, it is no excuse against a motion for judgment as in case of nonsuit, that the usual practice at the circuit has been to call over the calendar on the first day, without taking it up in order; unless the judge intimate that he will not consider the first the regular and orderly call.

BROWN and IVES *against* OSBORNE.

On motion for judgment as in case of nonsuit, on the usual affidavit, it was objected, that the *jurat* of the affidavit was subscribed, "G. M. G. commissioner under act 24th March, 1818." This commissioner resided in the city of New York. A certificate of the Secretary of State was produced, that the Governor and Senate had appointed commissioners for that city; and the question was, whether this vacated the office of commissioner under the act of 24th March, 1818 in cities. (Vid. sess. 41, ch. 55, and sess. 46, ch. 197, s. 1, 4.)

The office of commissioners to take affidavits, &c., under the act of 1818, in the cities, became vacant by the appointment of new commissioners for the cities, under the act of 1823.

ALBANY,
Feb. 1824.

Ex parte
Basset.

Curia. We think the office became vacant by the appointments under the act of 1823. The second *proviso* in the 4th section of this act, *that nothing in that section shall apply to commissioners in the cities*, relates merely to the mode of appointment, and excludes them from the operation of the second *proviso*. When new commissioners were appointed for the city, under the first section of that act, the old commissioners went out of office, by the ninth article of the constitution.

Motion granted.

Ex parte BASSETT.

A court of common pleas has a right, in their discretion, to set aside the report of referees, upon the ground that it is founded on the testimony of a witness who in their opinion was not credible.

So of the verdict of a jury.

And this court will not interfere, to regulate such discretion, by mandamus. Although they may think the common pleas erred.

Unless it be in a plain case admitting of no doubt; so that there is no room for discretion.

Where an inferior jurisdiction, having a discretion, has proceeded to exercise it, this court will not control it.

C. F. INGALLS moved for a mandamus to the Judges of the Court of Common Pleas of Washington county, commanding them to vacate a rule made by them setting aside a report of referees in a cause before them in which Basset was plaintiff and M. H. & A. S. White were defendants, and that they affirm the report which was in favor of Basset; and one point made was, that the Common Pleas in setting aside the report proceeded upon the ground that the principal witness sworn before the referees in behalf of the plaintiff, and on whom they principally relied, was not a credible witness. There was evidence before the referees for and against the credibility of the witness.

Ingalls remarked: It is the peculiar province of referees to judge of the credibility of witnesses. They are substituted for a jury, who are the exclusive judges of credibility; and no Court has the power, because they differ from them, to set aside the verdict. The office of a referee and juryman are precisely similar. It is to pass upon matters of fact and report the determination—not the facts. If this position be correct, the Court, in setting aside the report of the referees, have manifestly infringed upon their province. It

is not pretended that any principle of law has been violated by the referees.

ALBANY,
Feb. 1824.

Ex parte
Bassot.

Curia, per WOODWORTH, J. On looking into the papers upon which the Court below proceeded, we are satisfied they erred. We think that the circumstances relied upon to impeach the witness before the referees were not so strong as to call for the interference of the Court in setting aside the report. But it is equally clear that, whether the report should be set aside or not, was a question of discretion, the extent of which we cannot limit by the standard of our own opinion. It was a question upon the weight of evidence; and Courts will exercise a sound discretion on this head, in controlling the reports of referees, or the verdict of a jury. Should it appear, for instance, that a witness relied upon was shown to be totally destitute of credit, as that he was infamous, and he was not at all supported by any other evidence in the cause, the Court might in their discretion set aside a report or a verdict founded upon such testimony. So they may weigh the testimony, and if, in their view, it presents a striking preponderance on one side which has been disregarded by the referees or the jury, the Court may relieve although no rule of law have been violated. Wherever an inferior jurisdiction, having a discretion, have exercised it, this Court does not interfere by mandamus. A contrary practice would draw before us every investigation of fact which may arise in the Court of Common Pleas. We do not mean to say, that we would not grant a mandamus in a plain case, where the evidence is all one way, and there is nothing contradictory; where the case is so palpable as to leave no room for discretion in the Court below. But here was evidence on both sides; and it was in the sound discretion of the Court, whether they would interfere or not.

SUTHERLAND, J. The only question is, whether the Court below had a right to entertain the question of credibility. That Courts will review evidence upon its credibility, even before a jury, in extraordinary cases, is undoubted; and it follows of course, that they have the same power in rela-

ALBANY,
Feb. 1884.

Waring
v.
Baret.

tion to evidence before referees. But we will not interfere merely because we think the Court below have decided erroneously in a mere question of fact which they had a right to decide. It must, in its very nature, be a matter of discretion.

Motion denied.

WARING *against* BARET.

An assignee of a chose in action on which a suit is prosecuted for his benefit, on judgment for the defendant is liable for the costs.

An attorney is liable for the defendant's costs, in a suit brought by him for a non-resident plaintiff, where the defendant succeeds; and this though the plaintiff be merely nominal, having assigned his demand to a resident.

Form of the rule in such case, that the attorney pay \$100, and that the assignee pay the balance.

WALLIS moved for a rule that the attorneys for the plaintiff pay the defendant \$100, being a part of his costs which had been taxed in this cause, and that John Brady pay the balance. The suit was instituted upon a promissory note, negotiable, executed by the defendant to the plaintiff, who, at the time of the commencement of the suit, and ever since, resided without this state, and no security for costs had been filed. The note was assigned to Brady, for whose benefit this suit was prosecuted. On the trial, the defendant proved payment and had a verdict, and his costs were taxed at \$176 57. Brady was at the commencement of the suit, and still is a resident of this state.

Wallis cited the 14th general rule of January term, 1799, to show, that the attorneys were liable; and *The People v. Bratt*, (6 John. Rep. 818 ;) and *Ketchum v. Clark*, (4 John. Rep. 484,) as to the liability of Brady.

Dexter & M. T. Reynolds, contra, contended that this was not a case within the rule cited. The suit was commenced for the benefit of Brady, who is liable for costs. He resides within the state and has so resided ever since the com

menacement of the suit. He is the real plaintiff, and will be so regarded by the Court within the 14th general rule of January term, 1799.

ALBANY,
Feb. 1824

Palmer
v.
Peck.

Curia. It is enough to subject the attorneys to the costs, that the nominal plaintiff was a non-resident of the state at the commencement of the suit. By the rule referred to, their liability is confined to 100 dollars. We grant the rule that they pay this sum ; and that Brady pay the balance.(a)

RULE: On filing affidavits in this cause, by which it appears that the plaintiff is a non-resident of the state of New York, and that he was such non-resident at the time of the commencement of this suit, and that this suit was prosecuted for the benefit of J. Brady, the assignee of the note on which the action was founded ; and on motion on the part of the defendant in this cause, and after hearing counsel for D. B. & J. M. attorneys for the plaintiff in this cause, ORDERED, that D. B. & J. M. Esquires, pay to the defendant his costs accrued in this cause, to an amount not exceeding the sum of 100 dollars ; and that the said J. Brady pay to the the defendant the balance of said costs, and the costs of this motion.

(a) In *Norton v. Rich*, (20 John. 47,) there was a rule for an attachment against the assignee, in the first instance ; it appearing that the taxed bill had been demanded of him.

PALMER against PECK.

ON certiorari to a Justice's Court. It was moved that the Justice amend his return, by stating certain things and omitting or denying others.

How far the court will order a justice to amend his return to a certiorari. They will not order him

Per Curiam. We never direct the Justice to return that he return that such a thing is so ; but whether it be so or not.

ALBANY,
Feb. 1824.

Jackson
v.
Haines.

such a thing is true or otherwise; but merely order him to supply defects by stating whether the matters to which he is legally called upon to return, and to which he has omitted to answer, be true or false.

Motion denied.

JACKSON, *ex dem.* ELIZABETH VROOMAN and others,
against HAINES.

A female lessor of the plaintiff in an action of ejectment, is not exempt from an attachment for non-payment of the defendant's costs; where they do not exceed 50 dollars.

The statute, exempting females from imprisonment on execution, does not apply to such a case.

A MOTION was made for an attachment against Elizabeth Vrooman, one of the lessors of the plaintiff, for non-payment of the defendant's costs, which had been taxed on a verdict in his favor at \$33 50.

Her counsel objected, that the lessor being a female is not subject to arrest and imprisonment for costs, incurred as a lessor, unless they amount to more than 50 dollars. He relied upon the provision in the 34th section of the act for the amendment of the law (1 R. L. 527,) exempting females from imprisonment upon civil execution for any recovery which does not exceed that sum. Attachments are in the nature of civil executions, (5 John. Rep. 115,) and the legislature so consider them in the act for relief of debtors, &c. (1 R. L. 348, s. 1.)

Curia. We think the statute, relied upon, does not apply to this case. It is that no female person shall be imprisoned upon execution in any civil action for debt or damages, in which the debt or damages shall not, exclusive of costs, exceed 50 dollars. The terms made use of do not reach the case; and the consequence of applying them to an attachment for costs against a female lessor, would be to deprive the defendant of all remedy. An attachment is the only process by which the costs can be collected. The law does not give an execution against the goods, so that both person and property would be exempt in all cases where the costs are not more than 50 dollars. This never could have been the intention of the legislature. Indeed, they have

given a construction to the first section of the act for the relief of debtors with respect to the imprisonment of their persons, (1 R. L. 348,) the phraseology of which is much like this section ; which shows that they never could have meant an absolute exemption. In 1813, (sess. 36, ch. 203, s. 49,) they passed an act declaring that nothing in the first section of the act for the relief of debtors, &c., should be constructed to embrace the imprisonment of the plaintiff or the lessors of the plaintiff for costs only. If there had otherwise being any doubt upon our minds, it would have been removed by this declaratory law. We are clear that this lessor is not exempt from the process of attachment, either by the terms or policy of the statute.

ALBANY,
Feb. 1824.

Roosevelt
v.
Gardinier.

Motion granted.

J. S. & CORNELIUS V. S. ROOSEVELT *against* GARDINIER.

JULY 1, 1823, the defendant's attorney received a declaration containing the common counts in assumpsit, and July 12th, on a proper affidavit, he obtained from a Judge of the Common Pleas, who was a counsellor, &c., an order "that all further proceedings be staid until the plaintiff's attorney deliver to the defendant's attorney, a bill of particulars for which this action is brought." In the title of the order, in the name of Cornelius V. S. Roosevelt, the letters V. S. were omitted. The plaintiff's attorney believing this order to be a nullity on the face of it, paid no attention to it, but proceeded and took his default.

The defendant may demand a bill of particulars before appearance.

An order for a bill of particulars, staying the proceedings absolutely till a bill is delivered, is irregular.

It should be that a bill be furnished by such a day or cause shown against it.

A. Burr, moved to set aside this default for irregularity.

H. Bleeker, contra, contended that the order was a nul-

But though irregular, it stays the proceedings till vacated.

The law knows of but one christian name ; and therefore the omission of V. S. in the name of one of the plaintiffs in the title to such an order, is not such a misentitling as will render it null.

ALBANY,
Feb. 1824.

Roosevelt
v.
Gardiner.

Itty, 1. Because the defendant does not show by his affidavit on which the motion is founded, that he had appeared in the cause, when the order was obtained. This is necessary. (*Kitchin v. Blanchard*, 1 B. & P. 378.) 2. The order should have been to show cause. (1 Tidd, 534. 1 Dunlap, 403.) 3. The order is wrongly entitled.

Curia. The case cited from Bosanquet & Puller, is in point, to show that, in the Common Pleas, the defendant has no right to demand a particular, till after he has appeared to the action; but we find that the practice is different in the Court of King's Bench. In *Derry v. Lloyd*, (1 Chit. Rep. 724,) it was decided that the defendant may obtain an order for a particular before appearance. In a note to that case, Chitty cites Impey's K. B. 8th ed. where the same doctrine is laid down and the difference between the practice of the Common Pleas and King's Bench is noticed. The reason given in favor of the practice as it prevails in the latter Court, is that the defendant, on seeing the plaintiff's particular, may not think it worth while to be at any further expense, and settle the suit. We think the practice of the King's Bench the more reasonable. The same case *Derry v. Lloyd*, determines the effect of this order. We agree that it was irregular. It should have been to furnish a particular by a certain day, or show cause. But it cannot be treated as a nullity. Though improvidently made, or not in due form, it was effectual to stay the proceedings till revoked or altered by the Judge or set aside on motion. In *Derry v. Lloyd*, the Judge granted an order for a particular in an action for an assault, to which, as was agreed by the Court, it was wholly inapplicable. The attorney proceeded and took a default notwithstanding the order, and it was set aside; the Court holding the order operative till complied with, or vacated. The V. S. were no part of Cornelius Roosevelt's name. The law knows of but one christian name. The order, therefore, was properly entitled. (*Franklin & others v. Tallmadge*, 5 John. Rep. 84.)

Motion granted.

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MOREY *against* SHEARER.

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THE SAME *against* THE SAME

JUDGMENTS for the plaintiff, on confession by bond and warrant of attorney.

C. F. Ingalls & J. Crary, moved to set aside both judgments, on the ground that the bonds and warrants on which they were entered were usurious.

I. Williams & A. Van Vechten, contra.

The motion was heard upon lengthy affidavits, for and against the usury, containing facts which it is not necessary to state.

The Court, being clearly of opinion that no usury was made out in the bond and warrant upon which the judgment in the second cause was entered, denied any farther proceedings as to this. But it appearing to be doubtful whether the bond and warrant of attorney, on which the judgment in the first cause was entered, were or were not usurious, they directed an issue to try the question.

On moving to set aside a judgment by confession, on bond and warrant of attorney, for usury, it appearing from the affidavits to be doubtful whether the allegation of usury was true or not, the court directed a feigned issue to try the fact.
Form of the rule.

Rule accordingly.

NOTE. The rule was drawn up by Mr. *A. Van Vechten*, one of the plaintiff's counsel, and was entered as follows :

" *Lewis Shearer*
ads.

William Morey.

The Same

ads.

The Same.

} On motion of Mr. *C. F. Ingalls*, attorney for the defendant in the above two causes, and on reading the affidavits as well on the part of the defendant,

in support of the motion, as on the part of the plaintiff, in opposition thereto, it is ORDERED, that the defendant's attorney prepare the draft of a feigned issue to try the question, whether the bond and warrant of attorney, on which the plaintiff's first judgment is entered, are usurious; and

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that the draft of such issue be served upon the plaintiff's attorney, within 8 days after obtaining a certified copy of this rule, who shall have leave to propose and serve amendments, within 6 days thereafter; and if the said attorneys cannot settle the terms and form of such issue, it shall be the duty of the defendant's attorney to give 8 days notice to the plaintiff's attorney, that he will apply to one of the Judges of this Court, at a certain time and place to be specified in such notice, to have the terms and form of said issue settled: and it is further ordered, that the said issue be tried at the next Washington Circuit, and that the residue of the motion on the part of the defendant in the above causes be denied with costs."

At another day the rule was so modified by the Court, on motion of Mr. *Crary*, one of the counsel for the defendant, as to embrace the question of payment upon one of the judgments; and as this alteration was made at a late day in term, the Court enlarged the time of making up the issue.(a)

(a) As the practice in conducting these feigned issues may not be perfectly familiar to the profession, though a knowledge of it is often important, I have given below the forms of the rules and record as they were drawn up in *Filkins v. Brockway*, which was an issue to try the validity of a judgment, upon an allegation of fraud by a junior judgment creditor.

RULE for the issue:

<i>German G. Filkins</i>	}	16th January, 1823.
v. <i>Ephraim Brockway.</i>		
<i>Artemas Brockway</i>	}	<i>S. B. Ludlow, Att'y.</i>
v. <i>The Same.</i>		

A motion having been made by German G. Filkins for a feigned issue to try the validity of the judgment in the second above entitled suit, on filing several affidavits on the part of the said German G. Filkins, and also on the part of said Artemas Brockway, and on motion of Mr. L. Mitchell of counsel for said German G. Filkins, ordered, that a feigned issue be granted to try the validity of the judgment of Artemas Brockway against Ephraim Brockway, mentioned in said affidavits, and that all proceedings on the last said judgment be stayed till the further order of this Court, and until after said issue be tried; and further, that the said Artemas do not take any steps in regard to the real or personal estate, bought under said judgment, until the further order of this court; and further, that the attorney of the said German G. Filkins

prepare the record for the trial of the said issue, laying the venue in Rensselaer county, and furnish a copy thereof to the attorney of said Artemas Brockway; the said German G. Filkins to be the plaintiff in said record, and the said Artemas Brockway defendant; and if the attorney of the said Artemas Brockway shall object to the form thereof, he shall signify it by notice in writing to the opposite attorney in ten days, and the same shall be settled by a Judge of this Court on a four days notice: and it is further ordered, that the said issue may be tried at the next Circuit to be held in Rensselaer county; and that on such trial, the said Artemas be, in the first instance, required to prove the consideration of said judgment in his favor, with the particular time and times when and also how the indebtedness accrued on which said judgment was rendered, the costs to abide the event of the suit.

It seems from the record that the venue was changed, by consent or otherwise, from Rensselaer to Albany.

NISI PRIUS RECORD on the feigned issue.

[*Placita of January term, 1823.* After the memorandum of warrants of attorney, follows the memorandum of bill filed the same January term. Then follows the declaration thus:]

City and county of Albany, ss. German G. Filkins, plaintiff in this suit, Declaration complains of Artemas Brockway, defendant in this suit, in custody, &c. of a plea of trespass on the case, for that whereas the said Artemas Brockway, on the 3d day of May, A. D. 1822, at the city of Albany, in the county of Albany aforesaid, by the consideration of the Justices of the said Supreme Court of the state of New York, did obtain and recover a judgment in the said Supreme Court, against one Ephraim Brockway, for the sum of 800 dollars of debt, and 10 dollars costs, which said judgment was recovered and entered on the records of said Supreme Court, on a bond executed by the said Ephraim Brockway to the said Artemas Brockway, bearing date on the said 3d day of May, A. D. 1822, by virtue of a warrant of attorney signed and sealed, and for that purpose executed by the said Ephraim Brockway, and bearing date on the day and year last aforesaid; and whereas also the said German G. Filkins, on the 10th day of May, A. D. 1822, at the city and in the county of New York, and by the consideration of the Justices aforesaid, did obtain a judgment against the said Ephraim Brockway for 472 dollars and 38 cents damages and costs, which said judgment last mentioned was duly filed and docketed and entered on the records of said Supreme Court on the day and year last aforesaid, having been recovered and rendered on a verdict for 400 dollars damages and 6 cents costs, obtained by said German G. Filkins, in the month of April, A. D. 1822, against said Ephraim Brockway, in a certain cause tried at the city of Albany aforesaid, at the Circuit Court then and there held in the county of Albany aforesaid, for the trial of issues joined in the said Supreme Court, and which verdict was then and there rendered and given, for and on account of sundry gross trespasses, assaults and batteries and imprisonments of the said German G. Filkins, before then committed and done, by the said Ephraim, at Nassau, to wit, at Albany, in the county aforesaid: and where-

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as also afterwards, to wit, on the 1st day of December, A.D. 1822, at the city and in the county of Albany aforesaid, a certain discourse was had and moved between the said German G. Filkins and the said Artemas Brockway, of and concerning the judgment aforesaid of the said Artemas Brockway against the said Ephraim Brockway, and of and concerning the consideration of the bond and warrant of attorney aforesaid, and upon that discourse it was then and there, to wit, on the day and year and at the place last aforesaid, debated between the said German G. Filkins and the said Artemas Brockway, whether any and what consideration was ever and when and where paid to the said Ephraim Brockway by any and what person or persons for the said bond and warrant of attorney and judgment first above mentioned, and whether the said above mentioned bond and warrant of attorney were not fraudulently made and executed by the said Ephraim Brockway to the said Artemas Brockway, and by him accepted of, and whether the said judgment first above mentioned, in favor of the said Artemas Brockway against the said Ephraim Brockway, was not fraudulently entered of record in the said Supreme Court by the said Artemas, in order to defraud the said German G. Filkins, and to prevent the recovery by the said German G. Filkins of the judgment above mentioned, and of the sum mentioned in the verdict above mentioned, in favor of the said German G. Filkins against the said Ephraim Brockway; and thereupon the said German G. Filkins then and there asserted and affirmed that the said bond and warrant of attorney and judgment first above mentioned, were made, executed and created by the said Ephraim Brockway, without consideration, *bona fide* paid or made at the time of such making and execution aforesaid, or at any other time, to the said Ephraim Brockway, for the same, and that the said bond and warrant of attorney were fraudulently made and executed by the said Ephraim Brockway to the said Artemas Brockway, and fraudulently accepted and taken by the said Artemas Brockway, in order to defraud the said German G. Filkins and to prevent the obtaining by the said German G. Filkins of the amount of the verdict aforesaid, and of the judgment above mentioned in favor of the said German G. Filkins against the said Ephraim Brockway; and that the said judgment first above mentioned was fraudulently entered and placed on the records of the said Court by the said Artemas Brockway, in order to defraud the said German G. Filkins, and to prevent the obtaining and collecting by the said German G. Filkins of the amount specified in the verdict aforesaid and in the judgment above mentioned in favor of the said German G. Filkins, against the said Ephraim Brockway, which assertions and affirmations of the said German G. Filkins, above mentioned, he, the said Artemas Brockway, then and there denied, and then and there asserted and affirmed the contrary thereof; and thereupon afterwards, on the same day and year, at the city and in the county aforesaid, in consideration that the said German G. Filkins, at the special instance and request of the said Artemas Brockway, had then and there paid to the said Artemas Brockway the sum of 500 dollars, he, the said Artemas Brockway then and there undertook and faithfully promised the said German G. Filkins to pay him, the said German G. Filkins, the sum of 500 dollars, if the said bond and warrant of attorney and

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judgment first above mentioned were made, executed or created, or either of them was made, executed or created by the said Ephraim Brockway, without a consideration *bona fide* paid or made to the said Ephraim Brockway for the same, to the amount specified in the condition of said bond, or if the said bond and warrant of attorney were fraudulently made and executed by the said Ephraim Brockway to the said Artemas Brockway, or fraudulently taken or accepted by said Artemas Brockway, in order to defraud the said German G. Filkins, and to prevent the obtaining and collecting by the said German G. Filkins, of the amount of said verdict, or of the judgment above mentioned in favor of the said German G. Filkins against the said Ephraim Brockway, or if the said judgment first above mentioned was fraudulently entered or placed on the records of the said Court, in order to defraud the said German G. Filkins, and to prevent the obtaining and collecting by the said German G. Filkins of the amount of the judgment or verdict above mentioned, in favor of the said German G. Filkins against the said Ephraim Brockway, or any part of said judgment and verdict last mentioned; and the said German G. Filkins, in fact, saith that the said bond and warrant of attorney and judgment first above mentioned, were made, executed or created by the said Ephraim Brockway, without a consideration *bona fide* paid or made to the said Ephraim Brockway for the same, to the amount specified in the condition of said bond, and that the said bond and warrant of attorney were fraudulently made and executed by the said Ephraim Brockway to the said Artemas Brockway, and fraudulently taken and accepted by the said Artemas Brockway in order to defraud the said German G. Filkins, and to prevent the obtaining and collecting by the said German G. Filkins of the amount of said verdict and of the judgment above mentioned in favor of the said German G. Filkins against the said Ephraim Brockway, and that the said judgment first above mentioned was fraudulently entered and placed on the records of said Court, in order to defraud the said German G. Filkins, and to prevent the obtaining and collecting by the said German G. Filkins of the amount of the judgment or verdict above mentioned in favor of the said German G. Filkins against the said Ephraim Brockway, or some part of said judgment and verdict and judgment last mentioned, to wit, at the city of Albany and in the county of Albany aforesaid; whereof the said Artemas Brockway afterwards, to wit, on the day and year and at the place last aforesaid, had notice, whereby he, the said Artemas Brockway, then and there became liable to pay and ought to have paid to the said German G. Filkins the said sum of \$500; yet the said Artemas Brockway not regarding his said promise and undertaking, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the said German G. Filkins in this behalf, hath not as yet paid the said sum of 500 dollars or any part thereof to him, the said German G. Filkins, (although often requested so to do) but hath hitherto wholly neglected and refused, and still neglects and refuses so to do, to the damage of the said German G. Filkins of 500 dollars, and therefore he brings suit, &c. And the said Artemas Brockway, by **Plea.**

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Continuances

Welcome Esleeck, his attorney, comes and defends the wrong and injury, when, &c., and says that the said German G. Filkins ought not to have or maintain his aforesaid action thereof against him, because he says that though true it is, that the said discourse was had and moved by and between the said German G. Filkins and the said Artemas Brockway, wherein the said questions did arise as aforesaid, and that he, the said Artemas Brockway, did undertake and promise in manner and form, as the said German G. Filkins hath above in that behalf alleged. Nevertheless, for plea in this behalf, the said Artemas Brockway saith that the said bond and warrant of attorney and judgment first above mentioned were not made, executed or created, nor were either of them made, executed or created by the said Ephraim Brockway, without a consideration *bona fide* paid or made to the said Ephraim Brockway for the same, to the amount specified in the condition of the said bond; and that the said bond and warrant of attorney were not fraudulently made and executed by the said Ephraim Brockway to the said Artemas Brockway, nor fraudulently taken and accepted by the said Artemas Brockway, in order to defraud the said German G. Filkins, and to prevent the obtaining and collecting by the said German G. Filkins of the amount of said verdict nor of the judgment above mentioned in favor of the said German G. Filkins against the said Ephraim Brockway; and that the said judgment first above mentioned was not fraudulently entered or placed on the records of said Court, in order to defraud the said German G. Filkins, and to prevent the obtaining and collecting by the said German G. Filkins of the amount of the judgment or verdict above mentioned in favor of the said German G. Filkins against the said Ephraim Brockway, nor of any part of said judgment and verdict last mentioned in manner and form as the said German G. Filkins hath above in that behalf alleged; and of this the said Artemas Brockway puts himself upon the country, and the said German G. Filkins doth the like, &c. Therefore let a jury, &c. [*continuances by vice comes non misit breve to Oct. term, 1823,*] unless some one of our Circuit Judges shall first come according to the statute in such case made and provided, at a Circuit Court to be holden at the capitol aforesaid, in and for the city and county of Albany, on the 6th day of October next, by whom, &c. &c. the same day, &c.

POSTEA, endorsed thereon.

Afterwards, that is to say, on the day and at the place within contained, before the Honorable William A. Duer, Esq., Circuit Judge, come as well the within named German G. Filkins as the within named Artemas Brockway, by their respective attorneys within mentioned, and the jurors, of the jury whereof mention is within made, being summoned, also come, who being chosen, tried and sworn, say upon their oath, that the said bond and warrant of attorney, and judgment first above mentioned, were made, executed and created by the said Ephraim Brockway, without a consideration *bona fide* paid or made to the said Ephraim Brockway, for the same, to the amount specified in the condition of the said bond, and that the said bond and warrant of attorney were fraudulently made and executed by the said Ephraim Brockway to the said Artemas Brockway, and were fraudulently taken and accepted by

the said Artemas, in order to defraud the said German G. Filkins, and to prevent the obtaining and collecting by the said German G. Filkins of the amount of said verdict and judgment above mentioned in favor of the said German G. Filkins, against the said Ephraim Brockway, and that the said judgment first above mentioned was fraudulently entered and placed on the records of said Court, in order to defraud the said German G. Filkins and to prevent the obtaining and collecting by the said German G. Filkins of the amount of the judgment or verdict above mentioned in favor of the said German G. Filkins against the said Ephraim Brockway, in manner and form as the said German G. Filkins hath above in that behalf alleged; and they assess the damages of the said German G. Filkins by reason of the premises over and above his costs and charges by him, about his suit in this behalf expended to six cents, and for those costs and charges to six cents.

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Bugbee
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Surrogate of
Yates.

RULE to set aside the second judgment as fraudulent.

German G. Filkins

v.

Ephraim Brockway.

Artemas Brockway

v.

The Same.

October 31, 1823.

S. B. Ludlow, Att'y.

On filing the record of feigned issue ordered in the above entitled causes, with the postea thereon endorsed, together with the venire and Circuit Clerk's certified copy of the minutes of trial of said issue, and on reading and filing said postea, together with affidavit and notice, &c., and on motion of John W. Wheeler, of counsel for the above named German G. Filkins, ordered, that the judgment in the second above entitled cause and all subsequent proceedings thereon be vacated, and set aside with the costs of the application for said feigned issue, the costs of the trial of said issue and the costs of this motion to be paid by the said Artemas Brockway.

In the matter of BUGBEE *against* THE SURROGATE of YATES County.

W. M. OLIVER, moved for a mandamus to the Surogate of the county of Yates, commanding him to grant letters of administration of the goods, &c., of Alva Bugbee, late of the town of Benton, in the county of Ontario, (but now Yates,) to Jesse Bugbee. A. Bugbee died in March, 1821. At the time of his death he resided in the town of Benton, in the county of Ontario. In February, 1823, the town of Ben-

Bugbee, an inhabitant of the town of Benton, in the county of Ontario, died and afterwards the county of Yates was erected including the town of Benton:

Held, that the granting administration of the estate of Bugbee pertained to the surrogate of Ontario, and not to the surrogate of Yates.

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ton, with some other towns, were erected into a separate county by the name of Yates. (Law's sess. 21, ch. 30.) In June, 1823, Jesse Bugbee demanded of the Surrogate of Yates county, letters of administration, &c., A. Bugbee having died intestate. The Surrogate doubting his jurisdiction, delayed granting administration till the opinion of this Court could be taken on this subject.

Oliver, remarked that the only question for the Court would be, whether the Surrogate of Yates has jurisdiction, or whether the granting of letters properly belonged to the Surrogate of Ontario. The Surrogate of Yates did not wish to act unadvisedly; and the question is brought forward in this form with his consent. That the Court would give their opinion for the instruction of an officer in his duty, even where it is brought forward *ex parte*, will appear by *E. Cook's case*, (15 John. 183.)

Curia. We think the Surrogate of Yates has no jurisdiction. The third section of the act relative to the office of Surrogate provides, that Surrogates shall "have sole and exclusive power to take the proof of the last wills, and grant letters of administration of the goods, &c., of all deceased persons who, at or immediately previous to their death, shall have been inhabitants of the respective counties of such Surrogates, Alva Bugbee was, at the time of his death, an inhabitant of the county of Ontario, and granting letters of administration pertains to the Surrogate of the latter county.

Motion denied.

BYRNE, executrix of BYRNE, against MORRIS.

On a return of *cepi corpus*, the plaintiff may proceed to file common bail and take judgment, though the sheriff in fact have suffered the defendant to go at large without bail.

A return by a sheriff thus: "I have taken the defendant, who remains under my custody, so sick that I cannot have his body before the justices, &c." is a return of *cepi corpus* simply, and the addition "so sick, &c." is surplusage.

It seems, that the English return of *languidus* has no application to this state.

in writ to me directed, I have taken the within named *Andrew Morris*, who remains under my custody, so ill and weak, that I cannot have his body before the Justices of the Supreme Court of Judicature, at the day and place within contained as I am within commanded, without the greatest danger and peril of his life." The plaintiff filed common bail, and receiving no notice of retainer, proceeded to judgment by affixing a notice of the rule to plead, in the Clerk's office, &c. The declaration described the defendant as *in custody*, &c., the ordinary form upon a *cepi corpus*, and now, u.

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J. Anthon, for the defendant, moved to set aside the proceedings for irregularity. He said the return of *languidus* is in correct form according to all the precedents; and the defendant remained in the actual custody of the Sheriff. (Tidd's Prac. Forms, 83. Officina Brevium, 221. Dalton's Sheriff, 211.) Being in custody, the plaintiff ought to have declared against him according to the form prescribed in the act, (1 R. L. 353, s. 11,) expressing in custody of what Sheriff he was. The declaration was incorrectly served by putting up a notice in the Clerk's office. It should have been served on the prisoner himself, or on the Sheriff or jailer. (Id.)

It is doubtful whether upon the ordinary return of *languidus*, the defendant is sufficiently in Court for the purpose of any proceedings whatever, against him, until his body is brought in by *habeas corpus*, (2 Lill. Pr. Reg. 478,) or by a *duces tecum languidum*. (Ree's Encyclop. *Languidus*.) Unless the proceedings are in one of the ways for which we contend, the judgment will always pass against the sick man by surprise; the Sheriff always contenting himself with a mere entrance into the sick man's chamber, on which he founds his return.

R. Emmet & C. White, jun. contra. The defendant (or his friends) is evidently attempting, under pretence of his sickness, to baffle the justice of the Court.

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The whole objection is founded upon the supposition that the defendant is to be deemed *actually in prison*; whereas, in *fact* and *form*, the return imports no such thing, but directly the reverse. It alleges that the defendant was *arrested*, but that he was sick, and the Sheriff could not bring him into Court; or, in other words, *commit him to prison*. For if he had committed him to prison, the whole command of the writ would have been obeyed; and whether sick or well, the return would have been, simply, that he had him *in custodia*, to wit, *in prison*. But the *languidus* is assigned, as a reason why he could not have him in close custody, (*areta et salva custodia*.) As to his being under his custody (*sub custodia*) every defendant arrested is so, even when his appearance is endorsed, in legal contemplation. The very form of the declaration is so, as the defendant in that case, as well as where he gives bail, is stated to be in custody, &c. It is a *fiction*, for the purpose of jurisdiction; but as to the service of the declaration it is the *fact* only which is looked at; to wit, that the defendant is *actually* in jail.

The reason of the thing is so. Thus the statute referred to (1 R. L. 353, s. 11,) requires the declaration to be special, only where the defendant is taken, *and imprisoned or detained in prison for want of sureties*, that is, where he is either originally, actually committed to prison, or subsequently surrendered for want of bail. The act meant to guard against a judgment by surprise, when the defendant was in close custody, and could have no access to friends or other persons to assist him. The plaintiff then should be bound to serve him personally, or the Sheriff with the declaration. But where he is merely arrested, and then left at large, at his own house, surrounded by friends, with all opportunities of access, neither the words or spirit of the act apply.

The only question is, whether the Court, by the arrest, got jurisdiction of the case. Of this there can be no doubt. A man's being sick is no reason he should be *exempt from suit*. It may be a reason with the Court in giving indulgences, to enable him to make a fair defence. But when the

arrest is once made, and the defendant in custody, in legal contemplation (we speak now of the *formal custody* which gives jurisdiction) the plaintiff is at liberty to proceed with his suit. This is so in every case. It is so when the appearance is endorsed. He is then, for the purposes of the suit, supposed to be in custody. It is so, where he is arrested on bailable process, and suffered by the Sheriff to go without bail; and the plaintiff may waive bail and take judgment against him. It is so when he is in actual custody. The jurisdiction over the suit attaches upon the arrest, in whatever way the defendant is disposed of.

Then, in this case, the plaintiff had a right to file his declaration, and proceed in the suit; and he was not bound to serve the declaration on the Sheriff or defendant personally.

As to the possibility of the defendant's being surprised, it is a sufficient answer to say, that when such a case arises the Court will give relief. None here is pretended. But the argument has no weight in it. The sick man, when served with a writ, is apprised in the most solemn manner of the suit. He has only, as in other cases, to request his attorney or his friends, or some of his family, to attend to it.

It may be proper to add, that the return of *languidus*, in England and here, is of a totally distinct nature. In England each Court has a prison of its own—The Marshalsea for the K. B. and the Fleet for the C. P. All prisoners, in legal contemplation, and in fact where the body is actually taken, are brought to London, and committed to one or the other prison, and the Sheriff's duty and power over the prisoner then ceases. These prisons are distinct from the jails or county prisons. Now when the Sheriff is permitted to return "*languidus*," it is not an excuse for not arresting the defendant, but for not bringing in the body; that is, bringing him from a remote county in England, for instance, and committing him to the Fleet or Marshalsea. Accordingly, in the instances of return of *languidus*, referred to by the defendant's counsel, the Sheriff states in the return, that the defendant has been arrested and remains in his *Majesty's prison, under his custody*, i. e. in the common jail of that county, so weak, &c., that he cannot have him before our

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lord the king, &c., that is, cannot bring him to London, and turn him over to the Marshal. (Tidd's Pr. Forms, 83, Am. ed.) So in several returns given in the New Retorna Brevium, 167, the defendant is always stated to be *in priona domini regis*, or *in priona*—not *in custodia* merely. And the sickness of the defendant is given as the excuse for not bringing him to London, and delivering him to the Marshal.

In England the plaintiff cannot proceed until the defendant, is thus brought up and turned over. But with us every Sheriff of every county is the Marshal, and the defendant being in his custody, sick or well, the plaintiff may proceed precisely as he may in England, after the prisoner is delivered to the Marshal. And it would be a strange doctrine in England, if after the prisoner is in the Marshal's hands, the plaintiff must stop his suit because he was sick.

Anthon, in reply. As to all the grounds assumed by the plaintiff, I answer, the Sheriff has returned that he has the defendant *in his custody*. He is, therefore, a prisoner, and should have been proceeded against accordingly.

The plaintiff supposes the Sheriff to have returned *that he has arrested the defendant, who is so sick that he cannot convey him to prison*. This is not the return. It is, *that he remains in his custody*; the very return made in England, when the defendant is in prison, and sick. On such a return in England, the defendant cannot be treated otherwise than as a prisoner, and a different rule here would confound all practice on returns. How can this defendant be before the Court, unless he is in custody? When an appearance is endorsed, a rule is entered accordingly. Here unless he is a prisoner, the Court cannot have jurisdiction.

Curia. The question is, whether this is to be considered the ordinary return of *cepi corpus*, or *cepi corpus in custodia*. It is perfectly evident that the latter was not intended. The Sheriff served the writ, and the defendant was so sick that he could not be conveyed to prison with safety. If he was in the custody of the Sheriff in the county prison, it is immaterial whether he was sick or well, and it would be

idle to mention this fact of sickness in the return, unless it was intended as an excuse for not committing him to jail. He never was committed to prison; and it is in this case only, that the plaintiff is bound to designate the place of imprisonment in his declaration, or serve it either personally upon the defendant, or deliver it to the jailer. If the defendant has never been in jail, service on the jailer would be a nullity. We think this is to be considered a return of *cepi corpus*, simply, and all the additional matter contained in the return may be rejected as surplusage, though it would form a very good ground for a Judge's enlarging the time to plead, or an excuse for omitting to defend, upon motion to set aside a default on the ground of merits. By a return of *cepi corpus*, the defendant is considered in custody, for the purpose of giving the Court jurisdiction.

This was treated on the argument for the defendant, as the English return of *languidus*; but it is not so. In England, the King's Bench and Common Pleas have their respective prisons: the Marshalsea belongs to the former—the Fleet to the latter; and sometimes, when the defendant is sick in a remote part of the kingdom, the Sheriff, instead of committing him to one of these prisons, as he is required to do by the process, confines him in the county prison, and then makes the return *quod est languidus in prisiona domini regis*. But the practice upon a return of *languidus* has no application to this case. The moment the Sheriff arrests the defendant, he is in custody, and the Sheriff may so return, though in fact he suffer him to go at large without bail. The plaintiff has proceeded regularly, and the motion to set aside the proceedings must be denied.

Motion denied.(a)

(a) Before the 23 H. 6, ch. 9, A. D. 1445, (enacted in this state, 1 R. L. 423, s. 13,) the sheriff was not obliged to let to bail persons arrested on mesne process; and in case of his refusal, they were obliged to sue out a writ *de manucapione*, (2 H. Bl. 433, 4.) If to a *capias* he returned *cepi corpus et paratum habeo*, he was bound to have the body at the return of the writ; and, on failure, was amerced. (Dalt. Sh. 211, 213.) But if he returned *cepi corpus, et quod est languidus in prisiona* this was a good re-

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turn, if true that the party was sick; and a *duces tecum* might be awarded to the Sheriff to bring in the prisoner; or the defendant, if he would appear, might be received so to do. (Id. 213.) If the return was false, the Sheriff was liable to be punished by fine and imprisonment. (Id.) Whether a return of *languidus est* was good, without adding *in prisona*, was, in the time of Dalton, not well settled. (Id.) The returns of *languidus* given by him are as follows: "By virtue of this writ, A. B. within named, is taken by his body and is detained in prison or jail, so sick that I cannot have his body at the day and place within contained, without danger of his death." *Another*: "By virtue of this writ to me directed, I have taken the body of the within named J. S., which said J. S. is in the prison of our lord the king of C. so sick that, for fear of his death, I cannot have him before the Justices within written, at the day and place within contained, as within I am commanded." *Another*: (like the last as to the caption) "Which said J. is afflicted with so many infirmities, that I cannot have him without great danger of his death, on account of the debility of his body, before the Justices within written, at the day and place within contained, &c. (Id. 211.)

An action did not lie for a false return of *languidus*. (*Boles v. Lascel*, Cro. Eliz. 852.) The Sheriff was liable to an amercement only. But an action lay for a false return of *cepi corpus*, if he had not taken bail. (Roll. Ab. 807. Bac. Ab. Sheriff, (O).)

Where there was a return of *cepi corpus*, and the Sheriff did not produce the defendant, the ancient mode of compelling him so to do was by amercement; and this practice appears to have continued from the earliest times down to the beginning of the reign of Geo. 2, and to have given way to the proceeding by attachment at some period between the years 1724 and 1729. (Vid. 2 H. Bl. 434, n. (a) where all the authorities on this subject are fully cited.)

It will be seen by the opinion of the Court, and the argument in the principal case, that this *bringing in the body*, or in the language of our copies, having it *before the Justices*, &c., anciently meant an actual delivery of the defendant to the *Marshal of the Marshalsea*. But in this state every county prison is a *Marshalsea* for the Supreme Court, and a return of the defendant *cepi corpus in custodia* gives the Court jurisdiction, though it import no more than that the defendant is in the jail of the particular Sheriff who makes the return. (1 R. L. 353, s. 11.)

The rule to bring in the body has entirely lost its ancient meaning, and in the process of time has come to require no actual interference whatever with the body of the defendant, but a putting in special bail. (Vid. Dunt. Pr. 195, and cases there cited.) This bail is the Marshal, upon a *cepi corpus*, as the Sheriff is upon a *cepi corpus in custodia*.

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Baily.*Ex parte BAILY.*

I. SEELYE, moved for a mandamus to the Judges of the Court of Common Pleas of Otsego county, commanding them to grant a new trial in a cause in that court between Baily plaintiff, and Stocker defendant. The action was slander for charging the plaintiff with being a thief. On the trial, witnesses were sworn for the plaintiff, but none for the defendant. P. T. testified that he heard the defendant say to the plaintiff, "You will not only lie, but steal." C. B. swore that he heard a part of the same conversation: the plaintiff asked the defendant if he had not said, that he the plaintiff was a thief, and he could prove it? that the defendant did not reply. The plaintiff then repeated the inquiry, and the defendant then said, "You will steal." J. F. swore, that the defendant speaking to him of the same conversation, said that he and the plaintiff had had some dispute; the plaintiff called him a liar, and he said to the plaintiff, "You will steal," or, "You have stolen;" and he told the witness further, that the words were, "that the plaintiff was a thief or would steal," or something like that. He further told this witness, that at the time he made this charge against the plaintiff, he did not say he could prove it; and he thought that would be a defence to the action. B. F. swore, that he heard the conversation alluded to by the first and second witnesses, but did not remember the words distinctly. They were very insulting and abusive, and he did not hear the plaintiff use any improper language to the de-

It seems, that where a judge omits to notice material testimony in his charge to the jury, this is not error, unless the party call his attention to it, and request him to give it in charge.

The remedy for refusing to comply with such request is not by mandamus to compel a new trial, though the refusal be by a judge of the C. P. (who should refuse to grant a new trial) but by a bill of exceptions, and a writ of error.

In slander, where there is the least room for criticism on the import of the words, this should be determined by the jury, whose decision is conclusive.

Slander is in the nature of a penal action, and though the jury find for the defendant against the weight of evidence, a new trial will not be granted.

Though a verdict in the C. P. be against the weight of evidence, and that court, on motion refuse a new trial, there being a counsellor at law on the bench, yet this court will not interfere by mandamus.

Because the granting a new trial rests in discretion.

Though this court might interfere by mandamus in an extreme case of this nature, as where there is no room for doubt, yet such remedy should be exercised very sparingly.

A court will, in their discretion, sometimes deny a new trial, though the verdict be plainly against law, as if the nature of the controversy be trifling, &c.

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fendant. G. W. heard the same conversation ; did not remember the words, but understood the defendant to have made a general charge of stealing against the plaintiff. J. W. and W. H. proved that the defendant was a man of considerable property : and on J. W. being cross-examined, he said he served the writ on the defendant ; the plaintiff told him that the defendant had said to him, " You will steal, won't you ? " but did not say that this was the only charge the defendant had made against him.

The defendant's counsel moved for a nonsuit on the ground that none of the words proved were actionable. His Honor the First Judge, being of the degree of counsellor at law, was of opinion, that the motion should be granted, and assigned his reasons at length ; but he was overruled by the other two Judges on the bench, who decided that the cause should go to the jury, whose province it was to give a construction to the words.

The First Judge then charged the jury that altho' his individual opinion was unaltered that the plaintiff ought to have been nonsuited, yet a majority of the Court thought otherwise, and it was the opinion of the other members of the Court that he was about to deliver to them. He frankly and candidly invited them to consider it as the opinion of the Court ; and that he might very probably be mistaken, and the other members of the Court be right. He then stated the following propositions : 1. It is the province of the jury to construe the words, and determine their meaning ; and if they should find that the word *will*, as used, meant that the plaintiff *would be* guilty of stealing hereafter, then they ought to find for the defendant. 2. If they should find that the word *will*, as used, meant that the plaintiff had committed theft, then the plaintiff would be entitled to a verdict. The jury found a verdict for the defendant. A motion was afterwards made for a new trial, but denied.

Seelye remarked, that the words proved are in themselves actionable. They amount to a direct charge of theft, and it should not have been left to the jury to determine their actionable quality. This was a question of law for the Court to decide.

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But if the actionable quality of the words was to be determined by the jury, we contend it was not properly left to them by the Court. The charge related to the word *will*, and referred solely to the testimony of P. T. who swore that he heard the defendant say, "You *will* not only lie, but steal." At any rate, the whole case was put to the jury upon the testimony of P. T. & C. B. The testimony of the other witnesses was overlooked. G. W. understood the defendant to make a general charge of stealing. This was actionable. (*Ney v. Otis*, 8 Mass. Rep. 122; *Hegle v. Young*, 1 Wash. Rep. 152; *Fewle v. Robbins*, 12 Mass. Rep. 500, per Jackson, J.; *Peake v. Oldham*, Cowp. 275; *Oldham v. Peake*, W. Bl. Rep. 959; *Woolnoth v. Meadows*, 2 East, 453.) The words as stated by J. F. were, that the plaintiff *would steal or had stole*. All this evidence aside from that of P. T. & C. B. was laid entirely out of the case, both by the Court and jury. It should have been submitted upon the whole evidence, whether the charge of theft was intended. The case was suffered to turn entirely upon the construction of the word *will*.

The jury should have been charged to construe the words, as they would have been understood by the by-standers: and that if they believed they would have been understood to charge the plaintiff with theft, they should find for him.

S. Starkweather, contra. There were no actionable words proved; and as all the evidence referred to the same time and place, if any one set of words, as proved by any witness, was not actionable, the Court will intend, after trial, that the words found by the jury to have been spoken, were not actionable. In slander and the like actions, the Court will not grant a new trial, where the merits have been submitted to the jury. An acquittal is conclusive, as in case of a criminal prosecution. If words are not in themselves actionable, the manner of speaking them is to control their meaning. The jury have passed upon this point, and their finding is conclusive. They have, in the language of the charge, "construed the words, and determined their meaning," as they had a right to do.

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But the Court have no jurisdiction over the subject matter of the motion. The right to a new trial rested wholly in the discretion of the Judges who tried the cause. The appropriate and only remedy was by bill of exceptions to the opinion of the Court, and a writ of error.

Curia. The motion for a nonsuit was properly overruled. The Judge then proceeded to charge the jury, that the question for them to determine was how the words were to be understood; and the principal subject of complaint is, that he confined his notice solely to the words in proof which were grammatically prospective, "you *will* steal," without expressly submitting other sets of words, which it is insisted were established by the proof. He told the jury, that it was for them to say, whether the words were prospective, and meant that the plaintiff would *hereafter* steal, or that he had already committed theft; and though perhaps he may have laid too much stress on the word *will*, yet it was substantially a submission how they would understand the words, generally, as proved on the part of the plaintiff. It is objected that the Judge took no express notice of any other words than those proved by the witnesses P. T. & C. B. and particularly that he paid no attention to the admission which the defendant made to J. F. This would doubtless have been proper as showing an intention to charge the plaintiff with the crime of larceny, but the plaintiff's counsel should have called the Judge's attention to this testimony. Not having done so, he has no right to complain of the omission as erroneous. Nor is a mandamus the proper remedy. If the charge of the Judge was incorrect, the plaintiff should have taken his bill of exceptions, and reviewed it upon a writ of error. But aside from this difficulty as to the remedy, it is a sufficient answer to this application that the words proved would admit of some doubt as to their meaning, and where there is room for the least criticism upon their import, it is properly a question for the jury, whose decision is conclusive. It comes within the principle laid down by this Court in *Wilson v. Supervisors of Albany*, (12 John. 416.) We think the jury found against the weight of evi-

dence, but they had a right to decide. Slander is in the nature of a penal action, in which though the jury find for the defendant against the weight of evidence, a new trial is never granted. (*Hurtin v. Hopkins*, 9 John. 36.)

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As to the remedy by mandamus, it may be proper to remark, that though in extreme cases we might interfere, and control the Court below upon questions of fact presented in the form of a motion for a new trial, yet it is a remedy which should be used very sparingly. A contrary course would draw before this Court, whenever one of the parties should be dissatisfied with the decision of the Common Pleas, an examination of those questions which address themselves merely to the discretion of that Court. We should be perpetually appealed to for the adjustment of rights undefined by law. This would result in an endless conflict of opinion upon questions which must from their very nature be finally determined by the Court below, because they cannot be reached by the rules of law; and although we may think the inferior jurisdiction has erred, yet we will not interfere. It is true, that extreme cases may be supposed, which would form an exception to this doctrine. Where an action is brought on a promissory note, the execution of which is proved beyond all doubt, and yet the jury find against it, should the Court below refuse a new trial, we might interfere; but it would be improper to do this, in ordinary cases. Even where a verdict is plainly against law, yet the Court may many times properly deny a new trial; as if the controversy be very trifling in its nature, or contemptible in amount.

Motion Denied.(a)

(a) Vid. *Macrow v. Hull*, 1 Burr. 11; *Farewell v. Chaffey*, id. 54, and the cases there cited; *Fleming v. Gilbert*, 3 John. 528; *Hyatt v. Wood*, id. 239; *Hunt v. Burrell*, 5 John. 137; *Van Slyck v. Hogeboom*, 6 John. 270; and *Fester v. Whipple*, 8 John. 369.

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Lathrop
v.
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JACKSON, *ex dem.* EDSON and another *against* GAYER.

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H. H. Ross, for the defendant, moved for a view, which being successfully opposed by *Z. R. Shipherd*, the Court directed a rule to be entered *that the motion be denied*, without saying any thing about costs.

Shipherd, asked for the costs of opposing.

Curia. Wherever the rule is entered, *that a motion be denied*, the costs of opposing the motion follow of course, in all cases except where the contrary is expressed in the rule.(a)

(a) Vid. *Williams v. Smith*, 2 Caines' Rep. 253.

LATHROP *against* JUDIVINI.

Where an attorney boards at one dwelling house, and has his office at another dwelling house, and he is absent, leaving no one in his office, the service of papers should be by delivery to some person belonging to the house where he boards, rather than to one belonging to the house where his office is kept.

J. DICKSON, moved to set aside the default for not joining in error, and all subsequent proceedings for irregularity. He read affidavits, showing that before the rule for joining in error had expired, the defendant's attorney, on inquiry, found that the plaintiff's attorney was absent from home. He had an office, at which a clerk occasionally attended, but he was not in the office, and the plaintiff's attorney, and his wife, who was also absent, boarded at his father's house, which was in the same neighborhood with his office. The joinder in error was served on his father, at the house where he boarded.

Dickson cited *Gelston v. Swartwout*, 1 John. Cas. 136.

S. A. Foot, contra, read an affidavit showing that the office was a part of a dwelling-house where a family resided. He insisted that the service should have been on some per

son in that house, or some excuse be shown, why it was not. The rule cited authorizes a service at the attorney's dwelling-house, if no one is at the office, but not upon one in a house where he is a boarder merely. The boarding house of the attorney may be and frequently is a considerable distance from the office. The proper service, in such a case, would be on one in the house where the office is kept.

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WOODWORTH, J. The reason of the rule is in favor of the course pursued here. The paper will be better taken care of by a person belonging to the house where the attorney is a boarder, than by an entire stranger, as the person may be, though he reside in the same house where the office is kept.

Motion granted.

In the matter of THE SUPERVISOR and OVERSEERS OF THE POOR of the town of SANDLAKE *against* THE SUPERVISOR and OVERSEERS OF THE POOR of the town of BERLIN.

PURSUANT to an act passed June 19th, 1812, entitled an act to divide the towns of Greenwich and Berlin, in the county of Rensselaer, into three towns, these two towns were divided into three towns, by the names of Greenbush, Berlin and Sandlake; and the second section required "That as soon as may be after the first Tuesday of April next, the Overseers of the Poor and the Supervisors of the said towns shall, after due notice given by any one Supervisor, meet at the dwelling house now occupied by Thomas Thompson, and apportion the money and poor belonging to the said towns of Greenbush and Berlin, among the three towns, agreeable to the last tax list for said county, and that forever afterwards each of the said towns shall support and maintain their own poor."

Under the usual clause in an act dividing towns, requiring the supervisors, &c., to meet and apportion the poor and moneys of the respective towns, if they omit to do this, or do it partially by omitting to pass upon a particular paper, mandamus lies to compel them to correct the apportionment.

One who had been occasionally and partially relieved by the town, and whose circumstances had undergone no material change for the better, after being relieved, was holden to be a pauper within the meaning of this clause.

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The Supervisors and Overseers of Berlin and Sandlake met pursuant to this section, on the 13th May, 1813, and the officers of Berlin represented that there was but one person, (one Austin,) chargeable to Berlin, the expense of keeping whom was apportioned between the two towns, by a written agreement. Henry Saunders and Lois his wife, who had been occasionally relieved as paupers, by the town of Berlin, before the act passed, and who, at the time of the meeting, resided in a part of Sandlake, which before the act had been a part of Berlin, were not noticed in the apportionment, nor was the attention of the Supervisors, &c., called to this subject, except as it was incidentally mentioned by one of the Overseers of Berlin to one of the Overseers of Sandlake. June 7th, 1813, Saunders and his wife applied to the Overseers of Sandlake for relief, and have since that time been supported by that town at very great expense. H. Saunders died in 1816. His wife survived, and is still chargeable. They had lived in that part of Sandlake which, before the act was a part of Berlin, for several years; were in indigent circumstances, and during that time had been occasionally relieved by Berlin, as paupers. They had been so relieved as late as the winter of 1811 and 1812; but had not, at any time, depended solely on the town. From the time of passing the act, to the time when they became chargeable to Sandlake, they had not been in want of public charity, by reason of Saunders' (on sale of a small piece of land which he owned) having received \$100. The town of Sandlake had expended, since Saunders and his wife became chargeable, about \$1100 in their support. On finding that they were chargeable to Sandlake, the Overseers of the Poor of that town had often called on the Overseers of the Poor of Berlin for contribution towards their support, which the latter had declined, relying on the apportionment of the 13th May, 1813, as final and conclusive; and the Supervisor and Overseers of Berlin had refused to join in any farther apportionment, though notice had been given for this purpose pursuant to the act. A bill had been filed by Sandlake in the Court of Chancery, for relief, which was dismissed, on the ground

that if they had any remedy it was at law. (See 5 John. Ch. Rep. 232, S. C.)

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J. P. Cushman, moved for a mandamus, commanding the Supervisor and Overseers of Berlin to join in making the proper apportionment.

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He contended that Saunders and his wife were to be considered paupers of Berlin, at the time when the act passed. It is enough that they had been occasionally relieved. Being the proper subjects of apportionment, if the town officers have omitted to make it, this Court will compel them to proceed and do their duty. (*Hull v. The Supervisors of Oneida*, 19 John. 259.) Even if the subject was brought fully before them, and they misjudged upon the question whether these persons were to be considered poor within the meaning of the act, yet a mandamus should go to rectify the mistake. In the matter of *Bright v. The Supervisors of Chenango*, (18 John. 242,) the Supervisors had passed upon a Clerk's account for services, and rejected his claim upon the ground that it was not a proper county charge; and this Court being of a different opinion, enforced the claim by mandamus. It is not necessary to constitute a pauper that he should derive his entire support from the town. It is enough that partial relief is rendered. The moment a man applies for and obtains relief, to any degree, he is considered as a pauper, and the Overseers of the Poor may bind out his children as apprentices or servants. (1 R. L. 136.) Though not actually chargeable on the 13th of May, 1813, they were virtually so. They had been actually chargeable about a year before, and but a few months before the passage of the act, and had undergone no material change in their circumstances.

D. Buel, contra. We suppose that as both parties met and made a decision, unless it be very clear that there was not a substantial compliance with their duty, the Court will not interfere. The question arises upon a standing clause in the various acts by which towns have been divided. The powers conferred are temporary and personal in their very

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nature ; confined to the officers mentioned, and could never have intended to embrace their successors. The legislature did not mean that this duty should be performed by persons who might be wholly unacquainted with the subject. After the lapse of 11 years, we are called on to perform a duty which cannot be discharged with intelligence. If this matter is not to be considered *res judicata*, is it consistent with law or with policy to impose a duty of this nature, peculiarly belonging to the original Supervisors and Overseers of these towns, upon their remote successors ? It is plain that this was a matter of discussion on the 13th of May, 1813. If it has been passed upon, the proper remedy is by certiorari, not by mandamus. The case of *Hull v. The Supervisors of Oneida*, merely goes to show that where public officers omit to act, you will put them in motion, and compel them to meet if necessary. You will not undertake to guide their discretion. What else can you do here ? Suppose these Supervisors and Overseers to assemble ; would they not have a right to say, " We will not sit as a court of review upon the acts of our predecessors, who swear that they have decided the very questions now submitted to us : the power was confined to our predecessors ; or, at any rate, they have spent their powers, and nothing is left for us to do ? " If fraud or concealment should be imputed to the original Supervisors and Overseers of Berlin, their successors may say there was no fraud—no concealment. To warrant a mandamus, the right of the relator must be clear and unequivocal. (*The King v. The Gov. & Co. of the Bank of England*, 2 Doug. 524. *Mandamus to the Justices and Overseers*, 5 Mod. 420.)

But Saunders and his wife are not to be considered paupers at the period when the act passed. Paupers are always classed as permanent and temporary. It does not follow that because a man is once a pauper he is always a pauper. Did the legislature mean that the commissioners should travel back through a series of years to see who had received a bushel of wheat or other trifling article from the town, to aid him in a state of temporary distress ? The clause should be confined to persons actually chargeable at the time when

the apportionment is to be made. This is the only rule of construction which will admit of certainty.

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If there was fraud in the officers of Berlin, in omitting to present this subject to the commissioners, a mandamus is not the proper remedy. The individuals who committed the fraud should be sought out, and made to answer for it in their private capacity. This Court have decided that even a promise to one Overseer of the Poor shall not enure to the benefit of his successor; and I presume it will not be contended that a claim for a fraud is not only transferable from one set of Overseers to another, but that the successors of the fraudulent party shall be answerable for his acts. In order to grant relief, this Court must look into the accounts of Sandlake for 10 or 11 years past. Is there any precedent for such a proceeding? Who is to perform the order to be made? It must go against the present Supervisor and Overseers. Suppose them out of office; upon whom is the mandamus to operate? Will it bind the whole town of Sandlake? Or if it is to operate upon the person of the officers for the time being, how are they to be reimbursed? In England there are means of compelling the town to reimburse their officers for expenses incurred. (2 Salk. 531. 1 Str. 63.) If there is no legal means for reimbursing these men, are they to be thrown upon the honor of the town.

A. Van Vechten, in reply. By the 2d section of the act under which this application is made, these commissioners were required to meet, not to perform a judicial but a ministerial act—the apportionment of the poor and poor-money according to the tax-list. They were required to perform a positive duty, which was a mere matter of mathematical calculation. Sandlake being a new town it lay with Berlin to furnish the proper information. Have they done this? If not, they have done injustice, and the injury should be redressed. They mentioned that there was but one pauper and no more. That this was untrue appears from their own acts. They had before relieved Saunders and his wife as paupers. That they were not entered on the books as permanent paupers can make no difference. The object of the act was an

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honest division of expenses. Would leaving them off the poor-list just before the act passes or just before the apportionment is made, and a consequent refusal to consider them as paupers, satisfy either the terms or spirit of the law? Were not these paupers so situated as to require relief? That the town must ultimately have provided for them is evident from the result; for a few days after the apportionment, without any material change in their circumstances, Sandlake is charged with an allowance of about 200 dollars a year for their support. Does it lie with Berlin, who had made repeated provisions for these paupers, to deny that they were the proper subjects of apportionment? It is said, the only question was, were they paupers at the time of the apportionment? We grant this: but how is it to be determined? Because the town may have been relieved from their support for a few weeks, by the private charity of the neighborhood, does it follow that they cease to be paupers?

Have the officers of Berlin, then, fulfilled their duty? Have they united with those of Sandlake in a division of the paupers? It is said, this whole matter is *res judicata*. This we deny. It was so as to Austin, but the division was confined to him. It was the duty of the commissioners to apportion the whole of the poor; and the duty remains as to those paupers who have not been passed upon. As to these, the obligation imposed by the statute was not fulfilled.

It is objected, that the remedy by mandamus is confined to the individual officers who neglected to act at the day appointed; and cannot be extended to their successors. The statute requires the supervisors, &c., to meet on the 13th day of May, 1813, or as soon thereafter as may be. It refers to the officers, and not merely to the persons holding the offices. Suppose these commissioners had refused to meet at all; should we have been without remedy?

It is said, we have waited too long before we came here for a remedy. But the affidavits show that we have not waited very quietly. We went to Chancery and were sent back to law. The delay, therefore, is fully accounted for. We have called upon Berlin to perform their duty voluntarily; and there is nothing which looks like a waiver on our part.

It is complained, that we seek to punish the officers of Berlin for the fraud of their predecessors; but we ask no such thing. We do not seek to punish fraud. Here is a question between the two towns; and we seek relief against Berlin through the instrumentality of their officers. To whom, it is asked, is the mandamus to go? We answer, to the Supervisor and Overseers of the Poor of Berlin, in their official capacities. It must bind their successors. We ask them to do what they can easily perform—to meet us and make the apportionment. It is said they have a discretion, and what will the court order them to do, when they have assembled? We have answered already—to perform a positive duty by a plain rule, by which they are to make a mere computation of expense. But it is supposed they may not agree; that they may set up their discretion, and refuse to allow any thing, or allow a mere trifle—50 dollars, for instance. But will the Court tolerate this? What is their discretion? To allow a reasonable compensation, according to a given rule. And is not a mandamus the proper remedy? Its object is to compel subordinate officers fairly to do their duty, with a view to the end enjoined: in this case, not that 30 or 500 dollars should be allowed, but that they should make an estimate. A difficulty is started, as to the remedy which the defendants may have for a reimbursement. But if they disburse money in behalf of the town, pursuant to law, the law will give them the remedy. An Overseer of the Poor may be compelled to disburse moneys for the relief of a pauper, upon the order of a magistrate; and he must look to the town. Should the inhabitants of the town refuse to raise the money, this Court would compel them to do it by mandamus.

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Supervisor,
&c. of Sand
lake.

v.
Supervisor,
&c. of Berlin

Curia. Saunders and his wife had been occasionally supported as paupers by Berlin; and both at the time when the act dividing the town and erecting Sandlake passed, and on the 13th of May, 1813, the time of meeting to apportion the expense of maintaining the poor between the new towns they continued, in fact, poor and unable to maintain themselves, though they had not been actually chargeable for

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Supervisor,
&c. of Sand-
lake.

v.
Supervisor,
&c. of Berlin.

about a year. The relief which they had received was partial, and it was supposed by Berlin that they were not to be considered paupers, and consequently not the subject of apportionment under the act. We think otherwise, under the circumstances of this case. To fix on them the character of paupers, it was not necessary that they should subsist entirely upon public charity. Having been paupers and their circumstances not being substantially changed for the better, they continued the proper subjects of apportionment in 1813. Not having been taken into the account when the division of paupers was made between the two towns, we think this Court competent to compel the Supervisors and Overseers of these towns to do now what they should have done in 1813.

It is proper to observe, that if these commissioners had acted upon the subject, and adjudged that Saunders and his wife were not paupers, we should not have thought ourselves warrantable in interfering by mandamus. But it is inferable from all the papers that this was not done. The subject was incidentally mentioned at the meeting; but the commissioners did not act upon it as a board.

We grant the rule that a mandamus issue, requiring them to make the apportionment of the expense of these paupers, as they should have done in 1813; but without giving any directions beyond this.

RULE:

George Cipperly, Supervisor, *Stephen Gregory* & *George P. Haynor*, Overseers of the Poor of Sandlake,

v.

William H. Murray, Supervisor, and *Rodman Thomas* & *Eliphalet Niles*, Overseers of the Poor of the town of Berlin.

J. P. Cushman,
Att'y.

A rule having been granted at the last term of this Court, requiring the Supervisor and the Overseers of the poor of the town of Berlin, in the county of Rensselaer, to show cause on the first day of the present term of this Court, why a mandamus

should not issue against them, to make an apportionment of the expense of supporting Lois Saunders, a pauper, between the towns of Sandlake and Berlin, in said county, as is required by the act entitled "An act to divide the towns of Greenbush and Berlin, in the county of Rensselaer, into three towns," passed 19th June, 1812; and also requiring them to make a like apportionment of the expense incurred by the said town of Sandlake in the support of Henry Saunders, now deceased, a pauper of said town of Berlin, at the time of the passing of said act, and of the said Lois Saunders since the 7th day of June, 1823; and also requiring the Overseers of the Poor of the town of Berlin to pay to the Overseers of the Poor of the town of Sandlake such share of said expenses as may be ascertained to be chargeable upon the town of Berlin under the provisions of the said act; and on filing affidavits and other papers in this cause, and on motion of Mr. Cushman of counsel for the plaintiffs, and on hearing Mr. Buel of counsel for the defendants, no sufficient cause being shown, ORDERED, that a mandamus issue against the defendants, William H. Murray, Supervisor, and Rodman Thomas & Eliphalet Niles, Overseers of the Poor of the town of Berlin in the county of Rensselaer, commanding them, &c. (*as in the opinion of the Court.*)

ALBANY,
Feb. 1824.

The People
v.
Marsh.

THE PEOPLE *against* MARSH, Sheriff of ONONDAGA.

A common rule had been entered against the defendant thus:

<p><i>Willard Butterfield</i> v. <i>Eben Wallace &</i> <i>Asa Baker.</i></p>	}	<p>July 16th, 1823. <i>Butterfield & Loomis, Att'ys.</i></p>
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The Sheriff of Onondaga county having returned the *ca-pias* in this cause *cepi corpora*, ordered, on motion of Messrs. Butterfield & Loomis, attorneys for the plaintiff, that the said Sheriff bring in the bodies of the said defendants, in 20 days after service of notice of this rule, or show cause, on

Rule to bring
in the body.

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the first day of the next term of this Court, why an attachment should not issue against him.

Notice of this rule was served on the Sheriff Sept. 30, 1823, and at the next term, on motion in open Court, the following rule was entered :

<i>William Butterfield</i>	} In Supreme Court. November 1st, 1823. <i>Butterfield & Loomis, Att'ys.</i>
v.	
<i>Eben Wallace & Asa Baker.</i>	

Rule for attachment for not bringing in the body.

On reading and filing certified copy of rule entered in this cause, requiring the Sheriff of the county of Onondaga to bring in the bodies of the defendants in 20 days, or show cause on the first day of the present term why an attachment should not issue against him, and an admission of service thereof by Luther Marsh, Sheriff of the county of Onondaga, the affidavit of A. Loomis, and no cause having been shown pursuant to the said rule, on motion of J. C. Spencer, of counsel for plaintiff, ordered, that an attachment issue against the said Luther Marsh, for his contempt aforesaid.

An attachment having issued,

The sheriff must have full 20 days notice of the rule to bring in the body, exclusive of the 1st day of term.

Kellogg, now moved to set it aside ; and one ground which he took was, that full 20 days did not intervene between the service of notice of the rule to bring in the body and the day for showing cause. He cited Dunl. Pr. 195, and cases there cited.

P. S. Parker, contra. The 20 days had elapsed before the motion was made. Although the rule was to show cause on the first day of term, yet the whole term relates to the first day. The rule was not, therefore, confined to the first. This is like a notice of motion, which though for the first day, yet the motion may be made on any day during the term.

Kellogg, in reply. That is true : but if the notice is not served 4 days before term, it cannot be heard. Granting that this is in nature of a notice of motion, 20 days notice must be given, which is not done.

Curia. The Sheriff was entitled to full 20 days notice of the rule to bring in the body before the first day of October term, reckoning one day inclusive and the other exclusive, as on notices of rules to plead. He was entitled to the whole of Monday, the first day of term, within which to bring in the body, in analogy to the doctrine of the rule to plead, where the party is entitled to the whole of the last day within which to plead. Here the Sheriff is required to bring in the body, or show cause, all within 20 days.

The rule, therefore, is granted, but on condition that the Sheriff stipulate not to bring an action of false imprisonment.

Rule accordingly.

ALBANY,
Feb. 1824.

Bancroft
vs.
Wilson.

BANCROFT *against* WILSON and others.

J. DICKSON moved for judgment as in case of nonsuit, for not going to trial at the last Ontario Circuit.

Motion for judgment as in case of nonsuit cannot be made by one of several defendants without the concurrence of the others.

P. S. Parker, contra, read an affidavit showing that two of the defendants had pleaded their discharge under the "act to abolish imprisonment for debt in certain cases," and no other plea, to which the plaintiff had replied, confessing the pleas and praying judgment, to be levied not on the persons of the defendants but on their property. The defendants all joined in this motion.

Where all the defendants move for judgment, if it appear that either has no right to move, as if judgment be against him by default, the motion will be denied as to all.

Parker cited *Yates v. Lansing & others*, (8 John. 289.)

Curia. No issue being joined as to two defendants is a fatal objection. A motion for judgment cannot be made by one of several defendants, without the concurrence of the others; and it follows, that where all join, and it appears that one or more of the defendants have no right to move, the motion must be refused equally as if made by a part only of the defendants. The reason why one cannot nonsuit is, that the plaintiff cannot be nonsuited as to one defendant, and retain his suit as to the other

Motion denied.

ALBANY,
Feb. 1824

Harrower
v.
Betts.

HARROWER against BETTS.

It seems the plaintiff may retain his venue by stipulating to pay the expense of the defendant's witnesses.

But the defendant has no right to a change of the venue by stipulating to pay expense of the plaintiff's witnesses.

ASSUMPSIT. A motion was made in behalf of the defendant, on the usual affidavit, to change the venue from Steuben to Chenango : but being opposed by an affidavit of the plaintiff, in the usual form, showing that he had a greater number of witnesses residing in Steuben, than the defendant's affidavit showed on his part, who resided in Chenango ; in order to procure a change of the venue, notwithstanding the balance of witnesses was against him, the counsel for the defendant produced and offered to the counsel for the plaintiff a stipulation in writing, signed by the defendant's attorney, "to pay all the expenses of the plaintiff's witnesses who should attend to give evidence in this cause from the county of Steuben, or from any place within 30 miles of the court house in that county ;" and insisted that the Court would change the venue upon such a stipulation, though the balance of witnesses be in favor of the county where the venue is laid.

J. C. Clark, for the motion.

H. Welles, contra.

Curia. It seems that the plaintiff would be allowed to retain the venue, on such a stipulation, though the defendant have the greater number of witnesses in the county to which he moves to change it. (*Worthy v. Gilbert*, 4 John. Rep. 492.) But the defendant has no right to change the venue upon stipulating to pay the expense of the plaintiff's witnesses.

Motion denied.

ALBANY,
Feb. 1824.Merry
v.
Hallet.

In the matter of R. MERRY *against* STEPHEN HALLET,
Sheriff of HERKIMER county.

RYAN, recovered judgment against Suitor, for \$52 71, before a Justice of Herkimer county, filed a transcript with the Clerk of that county, and sued out a *fi. fa.* under which the Sheriff levied on a term of years, in a lot of land belonging to Suitor, and after advertising it for sale for six weeks, in a public newspaper of the county, sold it at public auction to the relator, Merry, who was the highest bidder. The Sheriff made and filed the usual certificate of the sale, which took place on the 24th day of January last.

A judgment is not a lien on a term for years.

Which, when sold on an execution, is irredeemable after one year.

A judgment creditor cannot redeem a term of years.

The purchaser insisted that he was entitled to an assignment of the term immediately; that the act giving time to redeem lands sold upon execution, does not apply to a term of years: he accordingly demanded an assignment of the Sheriff, who declined executing one till the usual time of redemption had expired, unless this Court should be of opinion, that the redemption law did not apply.

The above facts being agreed on by the relator and the Sheriff,

M. Hoffman, by the consent of both parties, and for the purpose of determining the question, moved for an alternative mandamus to the Sheriff, commanding him to assign, &c. He referred the Court to the act, (sess. 43, ch. 184,) the construction of the first, second and third sections of which were in question; and to the act relative to judgments, executions, and advertising real estate for sale. (1 R. L. 500. Id. 501, s. 2. Id. 505, s. 13.)

Curia. The only question is, whether a term for years is embraced by the words of the act. These are *lands or tenements*, the latter of which is a word of well known signification, importing not only land in which one has an estate of inheritance, or other freehold, but a term for years. This is a chattel real, and distinguishable, for many pur-

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In the matter
of De Wint.

poses from a mere personal chattel. *Putnam v. Westcott*, (19 John. 73,) is one illustration of the distinction. This Court decided in that case, that a term is not to be considered goods or chattels for the purposes of a sale upon an execution, issued out of a Justice's Court. The party, therefore, has a right to redemption, during the year; but we are of opinion that the right ceases here, and is not carried over to a judgment creditor upon default of the party to redeem, (as it would be if this were a freehold estate,) by the third section of the act. This section confers no right to redeem upon any one, other than a creditor, who has a judgment which is a *lien* upon the land sold. A judgment is not a *lien* on terms for years, but on freehold estates only. This distinction was well established before the 29 Car. 2, (1 R. L. 501, s. 3,) requiring judgments to be docketed in order to affect the purchasers of lands, and has been kept up ever since. A term is bound, like any other chattel, only by an execution. This Court decided, in *Vredenburg v. Morris*, (1 John. Cas. 223,) that a judgment docketed is not a *lien* on a term for years.

Motion denied.

In the matter of the petition of DE WINT and DE WINT.

On ordering a rule to pay out moneys which have been paid into this court, as belonging to unknown owners in the city of New York, under the powers of the corporation to enlarge and improve streets, this court will, if the claim be doubtful, require security to refund on the claim's turning out to be unfounded.

THE petition was for the payment of certain moneys awarded to the owners of a certain piece or parcel of land described in the said petition, on the enlarging and improving of Maiden lane from William street to Pearl street in the second ward of the city of New York. (See 1 Cowen, 595, S. C.)

On producing an affidavit of the regular publication in the New York American, a daily newspaper printed in the city of New York, for six successive weeks, of notice of an application to be made at the first day of this term, for a rule

the claim be doubtful, require security to refund on the claim's turning out to be unfounded.

requiring James Fairlie, Esquire, one of the Clerks of this Court, to pay to the petitioners the sum awarded by the commissioners of estimate and assessment on the enlarging and improving Maiden lane, &c., to the owners of all that certain piece or parcel of land described in the report of the commissioners and in the petition as follows, viz. (describing the premises,) and on motion of

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Feb. 1824.

Whitney
v.
Warner

J. I. Drake, for the petitioners—

Per Curiam. On granting this rule, it is proper to remark, that the 184th section of the *act to reduce the several laws, relating particularly to the city of New York, into one act*, under which this proceeding is conducted, authorizes us to *secure, dispose of, and improve the money, when paid into Court, as we shall direct.* (2 R. L. 418.) This act contains no clause, like the *act for the partition of lands*, (1 R. L. 511, s. 7,) expressly authorizing the Court, on directing a rule to pay over the moneys, to require security to refund, with interest, in case it shall at any time appear that the parties receiving the money are not entitled to it; and we require no security in this case. The omission is not because we doubt our power under the general words cited, but because the rights of the petitioners are very clearly and satisfactorily made out. In a case where there is doubt as to the title of the claimants, we shall exact the same security, in cases like this, as is required on ordering out moneys paid into this Court under the act for the partition of lands.

Motion granted.

WHITNEY against WARNER and CRISSEY.

ON certiorari to a Justice's Court. The affidavit on which the certiorari was allowed, was entitled and began thus :

An affidavit for a certiorari to a justice's court may be entitled in the

cause in the court below, but not in the cause in this court.

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Feb. 1824

Whitney
v.
Warner.

"Justice's Court.

George Whitney

ads.

*William Warner &
Peter Crissey.*

Before James Squires, Esquire, one of
the Justices of the Peace of the conn-
ty of Broome, 8th December, 1823.

Broome County, ss. George Whitney, the above named defendant being duly sworn, maketh oath and saith, that on the 27th day of November last past, a suit was commenced by the above named plaintiff against the above named defendant," &c. [going on and giving a history of the cause between the plaintiffs and defendant in the said Justice's Court.]

The affidavit purported to have been sworn before George Park, commissioner, &c.

J. A. Collier, for the defendant, moved to set aside the writ of certiorari for irregularity; and he made two objections. 1. That the affidavit was entitled. 2. That it was taken before a commissioner. In support of the first point, he cited *Haight v. Turner*, (2 John. Rep. 371.) As to the second, he said commissioners have no authority to administer an oath in a Justice's Court, or in a cause entitled in that Court. Their authority extends only to taking affidavits to be read in courts of record.

S. Sherwood, contra, said that if the case of *Haight v. Turner* had any application, it went to show merely that the affidavit could not be entitled in this Court. As to the second objection, though entitled in the Court below, it was still an affidavit to be used in a court of record, and might be taken before a commissioner.

Curia. Where there is no suit pending, but the affidavit is to be used as the foundation of a suit, it should not be entitled in any cause. This is the case of affidavits to ground a motion for a mandamus, an information, or, (in England,) to hold the defendant to bail. But we see no objection to entitling the affidavit in the suit in the Court below. The statute, (1 R. L. 396, s. 17,) requires the party applying for

a *certiorari* to make affidavit satisfying the Judge or commissioner who allows it, that there is reasonable cause for granting it, for error in the judgment below, which shall be specified in such affidavit. This is properly a proceeding in the Court below. If entitled in the Supreme Court, it would have been irregular, according to the case of *Haight v. Turner*, cited on the part of the defendant.

As to the second objection, it is enough that the statute expressly declares that the affidavit may be taken before any person authorized to take affidavits to be read in the Supreme Court.

Motion denied.

THE PEOPLE *against* FORWARD and DAY.

THE defendants were indicted at the Oyer and Terminer in Erie county, July, 1821, for publishing a libel. They pleaded not guilty, and the indictment was remanded to the general sessions of that county; but the defendants brought a *certiorari* to remove the indictment to this Court. This writ was granted, on motion, in August term, 1821. The general sessions, at their August term of the same year, received the writ, and directed a return to be made, without requiring the defendants to give bail; nor did the defendants themselves enter into recognizance, as required by the statute. (1 R. L. 141, s. 4.) At the January term of this Court, 1822, the defendants obtained a rule that all proceedings be stayed until the public prosecutor should consent to the issuing of a commission to take the testimony of foreign witnesses, a copy of which rule was served on the District Attorney of Erie, on the 23d day of May thereafter. On the 5th day of May, 1823, the defendants, on filing a stipulation in writing to that effect, signed by them and the District Attorney, with the Clerk of this Court in Utica, caused a rule for a commission to be entered, to examine certain witnesses named therein, agreeably to the rules

ALBANY,
Feb. 1824.

The People
v.
Forward.

The defendant sued out a *certiorari* to remove an indictment from the sessions to this court, which had been returned by the sessions without the defendant having given bail as required by statute, (1 R. L. 141, s. 4,) and a commission to examine witnesses had been issued under the direction of this court; but because no bail was in, a *procedendo* was ordered.

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Jackson
v.
Paul.

and orders of this Court, and to be subject to the same rules as when obtained in a civil cause ; but they had not proceeded to issue the commission ; and now,

J. King, in behalf of Mr. Potter Dist. Attorney of Erie, moved for a *procedendo*, on the ground that no bail had been given to warrant the writ of certiorari. He cited 1 R. L. 141, s. 4 ; id. 142, s. 6.

P. S. Parker, contra, said the only question was, whether the Court would interfere. The statute is plain, that a recognizance must be entered into, or the writ is unavailing, and the Court below must proceed of course.

Curia. Take your rule for a *procedendo*.

Rule granted.

JACKSON, *ex. dem.* COLDEN and others, against PAUL.

To warrant one's being made a lessor in ejectment, he must have a claim to a subsisting title or interest in the premises.

It is not enough that it may be a question on the trial whether the legal title is not vested in him.

THE declaration contained 8 counts, and the last set forth a demise from 18 persons, none of whom, (as the tenant stated in his affidavit,) he was informed and believed, pretend to claim any title to the premises in question. On this affidavit,

L. Ford, moved to strike out the 8th demise. He cited *Jackson v. Sclover*, (10 John. 368,) and *Jackson v. Richmond*, (4 John. Rep. 483.)

J. O. Morse, contra, read the affidavit of the attorney for the plaintiff, which stated that it might be a question on the trial, whether the legal title of part of the premises is not vested in the lessors named in the 8th demise.

Curia. This is not enough to warrant us in retaining that demise. The lessors must have a claim to a subsisting title or interest in the premises. The affidavit on the part of the plaintiff does not show this. *Jackson v. Richmond*, cited by

the counsel for the defendant, is decisive in favor of the application.

Rule granted.

ALBANY,
Feb. 1824.

Fifield
v.
Brown.

FIFIELD, Survivor, &c. against BROWN and others.

J. PLATT, moved for a rule that all proceedings stay on the part of the plaintiff, till the costs of a former suit in favor of the same plaintiff against the same defendants, (in which the *capias* was served on Brown only, (for the same cause of action, be paid.

The rule to discontinue, on receiving a plea of an insolvent discharge, is not a rule of course.

In the first cause, Brown had pleaded a discharge under the act to abolish imprisonment for debt, &c., obtained after the commencement of the suit. The defendants' attorney entered a rule to reply, served a notice thereof on the plaintiff's attorney, and entered a default for want of a replication. The default was entered March 26th, 1823. May 16th, of the same year, the plaintiff's attorney entered a rule of course, in the common rule book, that the plaintiff have leave to discontinue that suit without costs; and immediately commenced the present suit.

Motion to stay proceedings till the costs of a former suit be paid, comes too late after judgment perfected.

B. F. Butler, contra, read an affidavit of the plaintiff's attorney, showing that the judgment had been perfected, before he received notice of this motion.

Curia. The rule to discontinue was irregular. It is not of course to enter a rule to discontinue without costs, on receiving a plea of the defendants' discharge under the insolvent act. This can be done only upon special motion, and under circumstances to be shown on affidavit and approved by the Court. We should grant the motion, therefore, as applied for, but it comes too late. Judgment is perfected. Where an issue is joined in a cause, a motion to stay proceedings for non-payment of the costs of a former action, may be made before trial in the second. (*Cuyler v.*

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The People
v.
Adgate.

Vandcrwerk, 1 John. Cas. 247.) But clearly, it cannot be made after judgment.

Motion denied.

THE PEOPLE *against* LUTHER ADGATE late Sheriff of
Essex.

On the sheriff becoming fixed for not bringing in the body, the general rule is that he must pay the whole debt.

But if the defendant has been insolvent from the beginning, so that the plaintiff could have lost nothing, the court will order a perpetual stay of proceedings against the sheriff as to the debt, allowing the plaintiff to proceed and collect all costs.

And this was done where the sheriff had neglected to appear upon his recognizance taken upon the attachment, by reason whereof there was judgment against him and his bail.

Long sued Cutler by *capias* out of this Court, on which the defendant, Sheriff of Essex, arrested him, and was ruled to bring in the body, but not doing so, was attached and entered into recognizance to appear at October term, 1819. On that recognizance the present action was brought. At the return of the attachment, Adgate neglected to appear, and his recognizance was by rule of this Court delivered over to the attorney of Long for prosecution. The *capias* in this cause was returned *cepi corpus* in May term 1820, a declaration filed in May, 1820; and at the August term following the defendant applied to the Court to set aside the attachment and all subsequent proceedings. An order was then made that the defendant confess a judgment in this suit on the recognizance, the judgment to stand as security, Long, the plaintiff in the original suit, to proceed to judgment therein, and endeavor to collect the money due him from Cutler; and then apply to this Court for leave to take out execution for the uncanceled balance, and also for costs. Judgment was confessed on the recognizance accordingly; Long proceeded to judgment against Cutler; a *fi. fa.* was returned *nulla bona*, and now,

J. L. Wendell, for the plaintiff, on affidavit of the above facts, moved for leave to take out execution against the defendant, on the judgment upon the recognizance.

H. H. Ross, contra, read affidavits showing that Cutler had always since the arrest resided in Essex county, and had been utterly insolvent and unable to pay any thing for seven or eight years, now passed, and long before the commence-

ment of the original suit. He said the only question is, whether this Court will mitigate the amount of the recovery on the recognizance, under these circumstances : The Court could not have intended by their rule directing the defendant to confess judgment, to prevent his applying to mitigate the amount to be collected. Had judgment not been taken, the Court would have sent the cause to a jury where Long could have recovered no more than he had lost by the neglect of the Sheriff. This doctrine is fully established in *Russell v. Turner*, (7 John. 189,) where the cases are collected ; and in 1 Gould's Esp. pt. 2, p. 30, it is said that where the principal is *discharged*, and the bail *afterwards* fixed, the Court will allow an *exoneretur* to be entered on the bail piece ; and in *The King v. Adderly*, (Doug. 464,) Buller J. says, "it is competent for the Court to moderate the punishment, and not impose a fine on the Sheriff to the amount of the whole debt." There is no reason why the execution should go at all events for more than the costs of the suit on the recognizance : Cutler has resided in Essex ever since the arrest.

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v.
Adgate.

Curia. The rule of damages upon an escape would have allowed the plaintiff no more than his actual loss. In this case, of a non compliance with the rule to bring in the body, if the Sheriff is fixed, and a trial is lost, the general rule is, that he must pay the debt. But here the party is insolvent and has been so ever since the proceedings against him were commenced. Now the principle is no where laid down explicitly, that we may apportion the plaintiff's debt ; but in *The King v. Adderly*, (Doug. 464,) Buller, Justice, intimated, that when the Sheriff should come to purge the contempt for not returning a writ, it would be competent for the Court to moderate the punishment, and not impose a fine to the amount of the whole debt ; though in that case the general rule is the same ; and the Sheriff is in general made to pay the whole debt, (*id.*) The reason of such a course, in the present case, is too strong to be resisted, though the plaintiff may have lost a trial. Here is a strong, undisputed case of insolvency from the beginning. The plaintiff has lost nothing.

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Feb. 1824.

Sholts
v.
Judges of
Yates County

But as he may have been surprised by the affidavits or the part of the defendant, owing to the course which the proceedings have taken, we give him to the next term to disprove the insolvency, if in his power.

The Court, thereupon, directed a rule entered, of which the following is the substance.

RULE.—It appearing to this Court by several affidavits produced by the defendant, that John Cutler, at the time the suit of David Long was commenced against him was insolvent, and had not any property liable to execution, and has continued insolvent and without property ever since, ORDERED, that the motion for leave to take out execution for the uncollected balance due on the judgment of Long against Cutler, (not including the costs,) be postponed until the next term, to the end that the plaintiff in said judgment may disprove the said allegation of insolvency; and if he shall fail so to do, then that the execution be perpetually stayed as to the plaintiff's debt; and it is further ordered that execution may issue on the judgment against the defendant for a sum equal to the costs taxed in this suit, the costs taxed in the judgment of Long against Cutler, and the costs of this motion.

In the matter of JOHN SHOLTS *against* THE JUDGES of
the County of YATES.

An appeal from a justice's judgment tho' after a transcript filed and execution issued supercedes the execution.

JUDGMENT was given by a Justice of Yates county in favor of Sholts against Champlin, for \$46, on the 22d Aug. 1823. On the 25th, Sholts filed a transcript with the County Clerk, and took out execution on oath, and placed it in the Sheriff's hands.

This is the process of the common pleas, and they may make a rule setting it aside.

On appeal, a bond should be given and costs paid by the appellant within four days, as required by the fifty dollar act, or the appeal will be ineffectual.

But these facts need not appear from the justice's return.

It will be intended, on the return being filed, that the appellant proceeded regularly before the justice.

The appellee has no right to object to a hearing of the appeal, on the ground that the justice had not endorsed his approbation upon the bond, or omitted to file it within the time required by the act.

His approbation may be inferred from the act of filing the bond.

On the other hand, Champlin, on the very day the transcript was taken, filed with the Justice a notice of appeal, a bond as required by law, and paid all the costs required of him by the Justice on receiving the appeal. Notice of the appeal was given to the Sheriff, who nevertheless was proceeding under the direction of Sholts to sell Champlin's property. On this state of facts the First Judge of Yates county granted an order to stay proceedings upon the execution; and at the last January term of the Yates Common Pleas, that Court set aside the execution for irregularity, with costs, though the counsel for Sholts objected that the First Judge had no authority to stay proceedings upon it; and that the Court had no authority to set it aside. Previous to setting aside the execution, viz. at October term last of the Yates Common Pleas, the cause was tried and a verdict found for the appellee for only 15 dollars, instead of 46 dollars, the sum recovered before the Justice, on which the Court gave judgment.

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v.
Judges of
Yates County

On the cause being moved for trial upon the appeal, it was objected that it did not appear from the return that the notice of the appeal had been filed within four days from the time of rendering the judgment; nor that the costs in the Court below, had been paid within the four days; nor had the bond been left with the Clerk to be filed within the time required by law; nor had the Justice endorsed upon the bond that he approved of the security. Upon these grounds the appellee by his counsel, contended that the appeal was irregular; but the objection was overruled.

J. Dickson, moved for a *mandamus* to be directed to the Judges, commanding them to vacate the rule setting aside the execution.

W. M. Oliver, contra. The appeal, if regular, was a supersedeas to the execution, (sess. 41, ch. 94, s. 17,) and the only question is, whether the party can be deprived of his right to an appeal within the four days allowed, by the act of the plaintiff, who thinks fit to take out an execution immediately.

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Dickson, denied that the Court of Common Pleas had power to interfere with an execution issued, as this was, upon a justice's judgment. It cannot be considered the process of the Court of Common Pleas.

Curia. It was necessary that a bond should be given and the costs paid within four days after the judgment, in order to make an appeal operative; but these facts need not appear from the Justice's return. It lay with the opposite party to show affirmatively, that the bond and payment of the costs were out of time, if he wished to avail himself of the irregularity. Until the contrary was shown, the Court below were right in intending that the proper measures were taken before the Justice, on instituting the appeal. Nor should the appellant be prejudiced by the omission of the Justice to endorse his approbation upon the bond, or file it within the time required by law. Besides, his satisfaction with the security given should, as to the appellant, be inferred from the act of filing it with his return. The party ought not to suffer from such a trifling informality. The Common Pleas were regularly possessed of the cause.

Then had the Common Pleas jurisdiction of this execution? We think it is to be considered as the process of that Court. On a transcript being filed, and an execution issued, all control over it ceases on the part of the magistrate who renders the judgment. The execution issues from the Clerk's office of the Common Pleas, like their other process, and all control over it, properly belongs to that Court. It follows that they had power, in this instance, to set aside the execution for irregularity; and we are clear that the power was properly exercised. The appeal was a *superseas*, and the appellee having afterwards proceeded upon the execution, the opposite party had a right to call upon the Court to restrain him by a rule.

Motion denied.

ALBANY,
Feb. 1824.

Humphrey
v.
Cande.

E. HUMPHREY *against* CANDE & LASHER.

S. TREDWELL & J. & S. KISSAM *against* THE SAME.

S. L. EDWARDS and **H. Bleecker**, moved for a rule that certain moneys which had been levied upon a *fi. fa.* issued out of this Court, in favor of Chichester & Van Wyck, against the above defendants, and paid over to Chichester & Van Wyck, be refunded to the Sheriff who held the *fi. fa.* and paid over to Humphrey, plaintiff in the first cause, and Tredwell & J. & S. Kissam, plaintiffs in the second cause, according to the priority of their respective *liens* upon executions also issued out of this Court. The motion was made upon the ground that there never had been any judgment entered in favor of Chichester & Van Wyck.

An affidavit wrongly entitled, tho' the cause be rightly described in the body of the affidavit, cannot be read.

The affidavits upon which the motion was founded, were entitled thus :

"Supreme Court.

Abel Russ, assignee of Elijah Humphrey, Seabury Tredwell, Joseph Kissam & Samuel Kissam.

v.

Alvin Chichester & Abraham H. Van Wyck."

The affidavits then proceeded, and in the body of them the causes in which the question arose were described and set forth particularly and truly.

A. Spencer, objected, that the affidavits were wrongly entitled.

Bleecker, said it was enough that the causes were set forth by their true titles in the body of the affidavit. The opposite party has not been misled. The reason why an affidavit wrongly entitled, cannot be read, is that no indictment will lie for perjury, if it be false. Here the reason fails. The title may be stricken out, and still the affidavits remain good. On an indictment for perjury, the false title might be rejected as surplusage.

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Feb. 1824.

Lyon
v.
Burtis.

Curia. The objection is fatal. There is no such cause in existence, as the one mentioned in the title ; and such an affidavit is never received. The party cannot be convicted of perjury though he swear falsely. We refuse to hear motions for writs of *mandamus* upon affidavits which are entitled, and the same rule prevails in the King's Bench as to affidavits to hold to bail.

Motion denied.

LYON, *ex. dem.* EDEN and WOOD, *against* BURTIS and the
BANK OF NEW YORK.

THE SAME *against* DIFFERENT DEFENDANTS IN TEN
OTHER CAUSES.

On judgment being affirmed in the court of errors, execution may issue from this court at any time on filing the *remittitur*, of course, and without the entry of any rule for that purpose.

EJECTMENT. The plaintiff had judgment in these causes in the Supreme Court. The defendants removed them by writs of error into the Court for the trial of impeachments and the correction of errors, where the judgments were affirmed on the 18th day of December last. (Vide ante, 333.) The attorney for the plaintiff then caused the *remittitur* attached to the transcript in each cause, to be filed in the office of the Clerk of this Court in the city of New York, on the 7th day of February instant ; and issued writs of possession, tested at the city of Albany, on the 1st day of November last, returnable on the first day of the present term ; which had been executed.

E. Barnes moved to set aside these writs for irregularity. And he cited Com. Dig. Pleader, (3 B. 20,) *Vicars v. Haydon, lessee of Carrol*, (Cowp. 841,) Tidd, Pr. 1135, 6, 1 Archb. Pr. 236, *Lord Kinnaird et al. v. Lyall*, (7 East, 296,) *Penoyer v. Brace*, (1 Salk. 319, Barn. 201, 1 Ld. Raym. 244,) *Howard v. Pitt*, (1 Salk. 261,) and 4 Leon. 197.

A. Burr and *E. Williams*, contra, cited Lee's Dict. of Pr. 548, 9, 2 Tidd Pr. 1234, 5, 7th Lond. ed. 1821, 1 Salk. 261, 5, 319, 1 Ld. Raym. 244. They remarked, that the writ of error operated merely as a suspension of the execu-

tion. When this ceases, the party may go on upon his old record of course, on the proper evidence being filed to show that the suspension has ceased. There is no need of a rule. It is like the case of a *procedendo*. The party is remitted to his original rights. It is only necessary that the *superseas* should cease to operate.

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Hart
v.
Hildreth.

Talcott, (Attorney General,) in reply, said that though a transcript only was removed by the writ of error, yet to proceed in vacation is against the theory of this Court. The *remittitur* is a direction to proceed which they cannot receive and act upon except in term. He admitted that, on the arrival of a term, a rule that execution issue might be entered of course, on motion; but a judgment may be reversed in part and affirmed in part. In such a case, the rule and the award of execution upon the roll must be modified accordingly. If circumstances might require a special application to the Court for this purpose, a proper degree of caution would require that it should be done in every case. In this case no rule had been entered.

Curia. It is enough that the *remittitur* was filed, which may be done at any time before execution issues.

By the *remittitur*, the cause is here in the same situation, and for the same purposes, as before writ of error brought. No rule need be entered. The party may proceed with his execution, of course, as if it had never been suspended.

Motion denied.

HART *against* HILDRETH and others.

P. S. PARKER, moved for judgment as in case of nonsuit, for not proceeding to trial at the last Ontario Circuit,

Where the
circuit judge
suspended the
trial of a

cause, on the suggestion of the plaintiff's counsel that it would be a long cause, and the business afterwards took such a course that the cause could not be tried at that circuit, a motion for judgment, as in case of nonsuit, was denied without costs.

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Shaw
v.
Raymond.

which commenced on the 20th January last, and continued till Saturday thereafter.

V. Matthews, contra. On the part of the plaintiff, an affidavit was read, showing that the cause was called on Wednesday evening, but the Judge, on the suggestion of the plaintiff's counsel, that it would be a long cause, declined trying it at that time, declaring that it should not lose its preference, and proceeded to take up some other causes which had been reserved, and criminal business, which occupied the Court nearly the whole of the next day, when the Judge's attention being again called to this cause, he declined trying it that week, remarking that he expected Judge Rochester to close the business of the Circuit during the next week, and he set down the cause for Monday. On Friday evening the Judge stated that he had received a letter from Judge Rochester, that he was in ill health, and could not attend the next week; and on being again applied to, he declared that he should not try the cause; and the plaintiff had no opportunity to try it during the Circuit:

And for these reasons *The Court* denied the motion, without costs.

Motion denied.

SHAW *against* RAYMOND, impleaded with FORD.

Where to trespass against a sheriff for an act done by him in virtue of his office, he pleaded the general issue and two special pleas, to which the plaintiff replied, and there were demurrers to the replications, and a verdict for the sheriff on the general issue; *held*, that the demurrers could not afterwards be argued; and the defendant had his double costs.

Where there are several pleas, some of which are carried to an issue of law, and some to an issue of fact, the plaintiff may discharge the demurrers or try the issue of fact, at his election.

under a plaint in replevin. To these pleas the plaintiff replied, that the plaint had been set aside for irregularity. Demurrer and joinder, which is not yet determined. Upon this state of the pleadings, the plaintiff noticed his cause for trial at the last St. Lawrence Circuit, holden the 9th February instant, as well to try the issue as to assess contingent damages on the demurrers; but the jury, under the direction of the Court, found a verdict for the defendant. The same jury found a verdict against Ford, for \$178 60. The demurrers were noticed for argument at the present term.

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Shaw
v.
Raymond.

L. Hasbrouck & J. Fina, for the defendant, Raymond, now moved that judgment be entered for him, with double costs.

They cited 1 R. L. 345; *id.* 155; 6 John. Rep. 109; Str. 507; 1 Dum. Pr. 521, 3; 2 *id.* 732.

A. Hackley, contra, insisted that the application for double costs was premature. The defendant, who is acquitted should await the decision upon the demurrer.

But is he entitled to double costs on the state of the pleadings? Suppose the demurrer determined for him, he could have his single costs only, according to *Wait v. Durand*, (9 John. 254.) Can he have single costs, only, on the demurrer, which goes to the whole cause of action, and yet be entitled to double costs on the issue found for him?

Curia. The plaintiff had his election to go on in the first place upon his issue of law or of fact, as he should think proper, but he was bound to look to the consequences. Had the action been disposed of by the demurrer, costs would have been awarded accordingly. But he has chosen to have the question settled by a jury, upon the issue of fact; and a verdict has passed for the defendant. His issue of law can, therefore, avail him nothing. We cannot avoid seeing, that upon the whole record, judgment must be for Raymond; and we would not hear an argument upon the demurrer. (Vid. 2 Archb. 252, 3, and the cases there cited.)

Motion granted.

ALBANY,
Feb. 1823.

Thorp
v.
Faulkner.

THORP *against* FAULKNER manucaptor of REYNOLDS.

Bail who are excepted to, and do not justify, cease to be bail;

And an agreement between the parties to waive the exception, filing a declaration in chief, and going on to judgment, are no reasons against ordering an *exoneretur*.

THE defendant became special bail for Reynolds, on the 26th May, 1821, at the suit of Thorp. The bail piece was filed the 29th of May, and on the 31st the plaintiff's attorney entered an exception thereon. No notice of the exception was ever given to the bail, nor did he know anything of it, until about five months after it was entered. No waiver of the exception had ever been entered upon the bail piece; but the attorneys of Thorp and Reynolds, had agreed orally to waive the exception. A declaration was filed in chief, (not *de bene esse*), in consequence of this agreement; the cause proceeded to judgment; a *ca. sa.* had been returned *non est*, &c., and the defendant sued as special bail, by *capias*, returnable at this term.

J. Hamilton moved for a rule to enter an *exoneretur* on the bail piece, and cited *Flack v. Eager*, (4 John. 185,) *Livingston v. Bartle*, (id. 478,) *Aylett v. Hartford*, (2 Bl. Rep. 1317,) and *Ex parte Wright*, (2 Ves. Jun. 9.)

S. M. Hopkins, contra, cited *Humphrey v. Leite*, (4 Burr. 2107, and 1 Archb. 83,) and contended that bail are not discharged by an exception, unless it is followed by a substitution of other bail. In *Flack v. Eager*, the declaration was filed *de bene esse*.

Curia. We think this case clearly within the principle of *Flack v. Eager*; and in *The People v. Judges of Onondaga*, (1 Cowen, 54, 56,) the Court say, that if bail who are excepted to, do not justify within the time allowed by the rules of the Court, they cease to be bail; and the plaintiff cannot hold them by waiving the exception, even where there is no surprise.

Motion granted.

ALBANY,
Feb. 1824.SARGENT *against* DENNIS(N).Sargent
v.
Dennison.

THE declaration was entitled in May term, 1822. It was in case, for debauching the plaintiff's daughter, *per quod servitium amisit*, from the 18th day of August, 1822, being after the action commenced; which was so laid through a clerical mistake of the plaintiff's attorney. And the cause was carried down for trial, tried, and a verdict found for the plaintiff, before the mistake was discovered by the plaintiff's attorney. The declaration stated, that at the time the injury was committed, the daughter was an indentured servant to P. F. and was an infant under 21 years; that she continued a servant till the 18th August, 1821, when in consequence of her pregnancy, the indentures were annulled, and she went to reside with the plaintiff, her mother, who was a widow, and while an infant still living with the plaintiff, viz. on the 24th Feb. 1822, was delivered of a male child, &c., *per quod*, &c., from the 18th August, 1822, (*as before*.)

Clerical mistake by which cause of action was laid after commencement of suit, amended after verdict; tho' it was made a ground of objection at the trial; and the point was reserved.

The cause was tried before Judge NELSON, at the last Otsego Circuit, upon its merits, but several objections were taken during the trial, to the plaintiff's right to recover; and a motion was made for a nonsuit upon the ground (among others) that the declaration alleged the loss of service to have commenced after the commencement of the suit; but this point, with others, was reserved by the Judge for the opinion of this Court.

S. A. Foot, for the plaintiff, moved to amend the declaration and *nisi prius* record, by striking out of this averment, 1822 and inserting 1821.

Starkweather & I. Seelye, contra, did not deny that an amendment should be granted, if clear that the party could not be injured by it; but the Court would guard against the possibility of this. (2 Vin. 304, and the cases there cited.) Here the time is material as to the damages. Had the plaintiff been confined to an estimate of damages from 1822, it would have been a matter of mere mathematical calcula-

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Dennison.

tion. The defendant was surprised. He comes to defend upon one state of the pleadings, and evidence is received applicable to another and different state, embracing a larger amount in damages.

At any rate the motion is premature. It is connected with one of the points reserved at the trial, which is to be brought before the Court on a case, and should be postponed till the argument is heard upon the case. If the amendment is granted, the defendant should have leave to plead and go to trial *de novo*.

Foot, in reply. This is a mere clerical mistake, and stands in the way of discussion upon the case, and for that very reason should be amended now. Suppose it may have misled the defendant, the Court will not allow him to lie by and trip up another, upon such a mistake. (*Henry v. Brown*, 19 John. 49.) It appeared upon the declaration, and he should have demurred. But is a surprise a mere matter of presumption? None is shown. The Court will, at least, require the defendant to show that he was injured. Why should he have a new trial without first showing that he was prejudiced?

" *Curia*. This mistake is, clearly, the subject of amendment. The defendant shows no prejudice from it; nor do we see how he could have been prejudiced by it. Though the exception was taken at the Circuit, the Judge was right in not allowing it. We order amendments in cases like this at any stage of the cause.

Motion granted.

ALBANY,
Feb. 1824.Wightman
v.
Clapp.

WIGHTMAN against CLAPP.

On certiorari to a Justice's Court.

S. Cheever, for the defendant, moved for a rule that the Justice amend his return, in several particulars, by stating certain evidence which was not mentioned either in the affidavit on which the certiorari was founded, or in the return of the Justice. The return was simply the Justice's certificate endorsed upon the copy of the affidavit served upon him, stating in effect, that the affidavit contained a true history of the proceedings in the cause before him. It appeared among other things, by this return, that Wightman, the plaintiff below, declared against Clapp, the defendant below, in assumpsit upon an account; that Clapp pleaded the general issue as to all except 5 dollars of the plaintiff's account, and a tender as to this, which he paid into Court. He also gave notice of set off. On the trial, there was no proof of a tender, nor was it stated in the affidavits or return, that there was any such proof offered upon the trial. It farther appeared from the return that the jury found a verdict for Clapp of \$3 57, notwithstanding the \$5 paid into Court. The fact was not contradicted by any of the affidavits.

J. Koon, contra.

Curia. On looking into the affidavits and return which have been submitted to us, we find the truth of the latter strongly supported by several witnesses; and the additional testimony which the defendant in error seeks to have returned, appears to us wholly immaterial; but if it were otherwise, it would be idle to grant an amendment, when we cannot help seeing from the whole case, that the judgment must be reversed. The defendant below pleaded a tender of 5 dollars, which he paid into Court, thereby admitting this sum to be due to the plaintiff. No proof of a tender was offered or pretended, nor it is now pretended that any

A motion to amend a justice's return to a certiorari, made by the defendant in error, will not be granted if it appear by opposing affidavits that the amendment sought will be incorrect in point of fact.

Nor will it be granted where it appears that notwithstanding the amendment, the judgment must be reversed.

Where in assumpsit, in the court below the defendant pleaded a tender, but the jury found for the defendant tho' there was no proof of the tender, held, that this was a fatal error; & a motion in behalf of the defendant below, who was also defendant in error, that the justice amend by returning proof in the cause upon another point was denied.

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Snyder
v.
Warren.

such proof exists; yet the jury found 3 dollars and 57 cents for the defendant, contrary to his recorded confession he owed the plaintiff 5 dollars. Such a verdict cannot be sustained. An amendment would be useless, and is therefore denied.

Motion denied

In the matter of SNYDER & SNYDER *against* MOSES WARREN, Sheriff of the County of RENSSELAER.

A judgment confessed before a justice for 50 dollars, or less, is good, without the oath and specification required by the 7th section of the 50 dollar act.

The fifteen months redemption from a sale on execution allowed by the statute, are calendar, not lunar months.

In computing the time, the creditor is allowed full 15 months from the day of sale.

A judgment created upon full consideration, tho' for the express purpose of enabling the creditor to redeem, is valid.

A JUDGMENT was docketed in the Common Pleas of Rensselaer county, in favor of J. G. & H. Snyder, against Barnard Wagar, for \$1575 10, on which a *fi. fa.* was issued, and on the 15th August, 1822, the Sheriff of Rensselaer county sold a farm of Wagar to the Snyders at a bid of \$888, and executed to them a certificate of sale. On the 15th November, 1823, Wagar confessed a judgment before a Justice of Rensselaer county, in favor of J. P. De Freest, for \$25 27 damages, with 81 cents costs, a transcript whereof was filed in the Clerk's office. On the same day, De Freest applied to the Sheriff to redeem the farm sold as a judgment creditor, and tendered to him the amount bid by Snyders, with 10 per cent. interest from the time of the sale. The Sheriff received but 7 per cent., thinking himself authorized to take no more, but a few days after, having taken legal advice on the subject, he consented to receive the residue.

The judgment before the Justice was confessed under the following circumstances: On the 14th November, 1823, Wagar being indebted to De Freest, on a small note and book account, the latter told Wagar that he wished to become a judgment creditor of his, for the purpose of redeeming his farm from the sale to the Snyders, and offered him \$1800 for it. Wagar accepted of the offer, and the same day confessed a judgment for the balance due to De Freest, amounting together with costs to \$7 27, before a Justice in Pittstown. The next day the parties proceeded to Troy, and there

Learning that so small a judgment would not entitle De Freest to redeem, not operating as a *lien* on the lands of Wagar, De Freest advanced him 18 dollars, which, together with the small judgment, formed the consideration of that upon which De Freest claimed to redeem. No statement of the consideration of the judgment was sworn to or filed, agreeably to the 7th section of the 50 dollar act. On the 20th November, 1823, the Snyders called on the Sheriff for a conveyance, which the latter declined giving, on account of De Freest's claim to redeem. On these facts,

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Snyder
v.
Warren.

J. P. Cushman moved for a *mandamus* commanding the Sheriff to convey to the Snyders.

He said the judgment being by confession was void, the defendant not having made oath as required by the 7th section of the 50 dollar act.

[WOODWORTH, J. It was decided otherwise at the present term. The obligation to file a particular of the consideration, does not apply to confessions where the sum is less than 50 dollars.]

The attempt to redeem was not in time. It was not in 15 months after the sale, within the meaning of the statute giving the right ; which intends *lunar*, not *calendar* months.

[WOODWORTH, J. Our attention was drawn to that question in a case lately before us, and though it was not necessary to pass upon it, yet none of us entertained any doubt that the statute intended calendar months.]

At any rate, the day of sale must be included in the computation ; and if so, giving De Freest his calendar months, he was too late. The words of the act (Sess. 43, ch. 184, s. 3,) are, that it shall be lawful for any creditor, &c., within 15 months *after such sale*, &c. Any other creditor may, in like manner redeem the lands and tenements so sold *within 15 months from the sale thereof*. The time commences from the *sale*—not *from*, or *after* the *day* of sale ; and when the computation is from or after an act done, the day on which

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v.
Warren.

the act was done is to be included; (*Rex v. Adderly*, Doug. 463; *Castle v. Burdett*, 3 T. R. 624, *Clayton's Case*, 5 Co. L. *Glassington et al. v. Renolds et al.*, 3 East, 497, 4 Esp. Rep. 224; 1 Ld. Raym. 480; Bac. Ab. Dower, (B. 1.)

Again, this confession was in fraud of the act. The Court should discountenance such an attempt to pervert the statute to the purposes of speculation upon an honest purchaser. To sanction this proceeding will be virtually to give a defendant 15 months instead of 12 to redeem, for he can always do this through a friendly judgment creditor, created for the occasion.

J. Paine, contra. Here was a small debt subsisting which was made larger on the credit of Wagar's residuary interest in the land. It is well settled that the purchaser at a Sheriff's sale acquires no more than a mere *lien*, till the 15 months have expired. He had no greater interest than a mortgagee, with whom it does not lie to complain of fraud because a third person is invested with a right to redeem, by a purchase of the equity of redemption, or otherwise. If Wagar could in this way sell for \$1800, as between him and the purchaser, which should have the benefit of such a price? Why not the debtor?

As to time, it is true there are some decisions in England growing out of the excise law, in relation to which the policy of the Court conspired with that of the government to contract the time, saying that in computing from an act done, the day of doing it is to be reckoned inclusive. But the act under consideration is construed liberally. Calendar months are allowed. Redemption is favored. The ordinary rule of computation, with us, is one day inclusive and the other exclusive. Exclude the first day and we are in time.

He cited *Hoffman v. Dual*, (5 John. Rep. 232.) and *Gillespy v. White*, (16 John. 120.)

Cushman, in reply, said the computation of time by reckoning one day inclusive and the other exclusive, which prevails in this Court, relates merely to rules and the service of

papers. The same mode of computation prevails in the K. B. but this never has been extended to a statute or contract, &c.

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Feb. 1894.

Huntington

v.
Goodwin.

Curia. We do not consider it a valid objection, that this judgment was entered for the express purpose of enabling De Freest to redeem. It was upon full consideration. The debtor may confer the power of redeeming upon as many as he pleases. It keeps up the auction; and is thus directly within the policy of the statute.

We are clear that the 15 months intended by the statute, are calendar not lunar months. The second section is, in terms, of calendar time. It speaks of a year for the debtor; and then the 3d section extends that time three months in favor of the creditor.

The creditor had the whole of the 15th November in which to redeem.

Motion denied.

HUNTINGTON *against* GOODWIN.

On certiorari to a Justice' Court. In this cause a motion was made in behalf of the defendant in error for a rule that the Justice amend his return.

On moving to amend a justice's return to a certiorari, the court require the production of the return or a copy of it, though the application be made by the defendant in error.

W. Barnes, for the motion.

B. P. Johnson, contra.

Curia. We do not find a copy of the Justice's return among the papers delivered to us, upon which this motion is founded: there is, however a sworn copy among the papers in opposition to the motion. We, therefore, grant the rule, as applied for; but we take the occasion to remark, that whether the application to amend be made on the part of the plaintiff, or the defendant in error, we do not grant it unless we have before us the return, or a copy thereof. Without this, it is impossible for us to see whether the amendment sought be material.

Motion granted.

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Feb. 1824.

The People
v.
Kingsley.

THE PEOPLE *against* KINGSLEY.

It is a general rule, that in an indictment for forgery, the instrument forged should be described particularly.

But if in the hands of the defendant, or lost or destroyed by him, the indictment may show this excuse, and set forth the instrument in general terms, if it contain enough to show the offence.

Dates, sums, and times of payment may be omitted ;

And parol evidence given of the contents.

That the instrument forged was in possession of the party at the time he uttered and published it, is *prima facie* evidence that it continues under his control at the time of the trial.

THE defendant was convicted at the last Oyer and Terminer in Seneca county, of having feloniously forged a bond with intent to defraud one John Sinclair.

The indictment charged, that the defendant, "On, &c., at, &c., did falsely and feloniously make, forge and counterfeit, and did then and there willingly and feloniously act and assist in the false making, forging and counterfeiting, of a certain false, forged and counterfeited bond and writing, obligatory for the payment of money, bearing date on some day to the jurors aforesaid unknown, in a penal sum to the jurors aforesaid unknown, with a condition thereunder written for the payment of a certain sum to the jurors aforesaid unknown, at some day thereafter to the jurors aforesaid unknown, with interest thereon, to the said Samuel Kingsley, (the defendant,) purporting to have been executed by one George Bockhoven, late of, &c., which said false, forged and counterfeited bond and writing obligatory for the payment of money, is in the possession and custody of the said Samuel Kingsley, (the defendant,) with intent to defraud one John Sinclair ; against the form of the statute in such case made and provided, &c."

The second count of the indictment described the bond in the same manner, and stated that the defendant had destroyed it, on some day to the jurors unknown.

The third count was for uttering and publishing as true, a bond, &c, described in the same manner, on some day to the jurors unknown.

The 4th count described the bond, alleged to have been forged, particularly ; and as there was a variance between the amount of the condition and the bond, as stated in the indictment, and the one proved upon the trial, the Attorney General, who argued for the people, did not insist upon a judgment on this count.

The record was removed to this Court by a certiorari, and the evidence given on the trial was also certified with the writ.

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v.
Kingalev.

It appeared, from this evidence, that the counsel for the people had, on the day of the trial, served the defendant with notice to produce the bond, described in the indictment, at the trial of the cause; but he produced no bond. The forgery of a bond as set forth against Bockhoven, payable to the defendant, was clearly proved, the witnesses giving particulars of its contents, in respect to the penalty, condition, date, and times of payment; that the defendant attempted to sell the bond to Sinclair, but the negotiation failed, and it did not appear that the bond had since been seen in his possession.

The prisoner now being brought up on a *habeas corpus*, by the Sheriff of Seneca,

M. Hoffman, moved in arrest of judgment, and the only question was upon the degree of certainty necessary in setting forth the bond.

He said the indictment should set forth an exact copy, or its purport, so that, on its face, it may appear to be susceptible of forgery. (1 Chit. C. L. 234. 3 id. 1040, and the cases there cited. 2 East, C. L. 975, 985, s. 53, 58, &c. *People v. Franklin*, 3 John. Cas. 299. *The State v. Gustin*, 2 South. Rep. 744.)

Independent of authority, it is clear that the indictment should be so certain, as to inform the party what he is called upon to meet, to enable the jury to understand and apply the evidence; to warrant the Court in giving judgment; and, in the event of an acquittal, to save to the party his plea of *autrefois acquit*. The generality and uncertainty of this indictment will do neither.

Neither the notice to produce the bond, nor the evidence that it was in the defendant's possession, was sufficient to dispense with its production.

Talcott, (Attorney General,) contra. There can be no dispute about the general rules of certainty upon which indictments for forgery are to be framed. The only difficulty

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is in their application, in saying what the law considers uncertainty. If the strictness contended for is to prevail, it will overthrow some of the best established principles on this subject. It is enough that the offence is brought within the words of the statute creating it, (3 Ch. C. L. 468,) which are, *bond or writing obligatory*. (1 R. L. 405.) Neither the time nor amount is essential to the crime. What is to become of the numerous cases where counterfeit bank notes are destroyed by the offender? Is he to escape because they cannot be particularly described? No. Neither the date nor time of payment, are holden material in that case. (*Commonwealth v. Ross*, 2 Mass. Rep. 373.)

The present case comes within the distinctions laid down in *The Commonwealth v. Houghton*, (8 Mass. Rep. 107.) The instrument must be described, or a reason given in the indictment why the description is omitted. Judgment was arrested in that case because no reason for the omission was given. In this case the cause appears upon the face of the indictment, and is sufficiently shown in evidence. (*Commonwealth v. Snell*, 3 Mass. Rep. 85.)

Hoffman, in reply, said that in *The Commonwealth v. Houghton*, the indictment was much more certain than this. Yet the Court arrested the judgment, because it was not certain enough. What is there said about less certainty being admissible, if the indictment show an excuse for it, was *obiter*.

Cyria. The evidence of this crime was most clear; and the only question is, whether the indictment is sufficiently certain to warrant us in giving judgment. The indictment excuses the want of a more particular description, by averring that the bond was with the defendant. There is no doubt of the general rule, that the instrument forged must be set forth with particularity and certainty; but to require this unqualifiedly, in all cases, without exception, would result in a failure of public justice. We think *The Commonwealth v. Houghton*, presents the true distinction. "There are cases," says Judge Sedgwick, "which will form just and

necessary exceptions to this rule ; as where the instrument forged has been destroyed by the prisoner, or has remained in his possession," &c. "But," he continues, "in every such instance, that the exception may be admitted, it must appear in the indictment what is the cause of the non-description of the instrument;" giving the present case precisely.

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Brown
v.
Lerow.

The general proposition, so often repeated in the books, that the instrument must be produced in evidence, is no more than the rule on the civil side, that the best evidence the nature of the case admits must be produced. The rule always yields, where the instrument is either lost, destroyed, or, as here, in the hands of the opposite party. This exception underwent full consideration in *The Commonwealth v. Snell*, (3 Mass. Rep: 82,) and the Judges were unanimous in its favor.

The evidence that the bond continued in the defendant's possession, was sufficient. He presented it to Sinclair, and after this we have no account of it.

Motion denied.

NOTE. The prisoner was sentenced to the Auburn state prison for 7 years.

BROWN, by BROWN his next friend, against LELOW.

ON certiorari to a Justice's Court. Brown, the plaintiff in error, assigned infancy for error, on which issue was taken ; and being tried and the jury having found the infancy, the plaintiff's attorney filed the *nisi prius* record, *postea*, &c., and entered a rule of course, in the common rule book, for a reversal of the judgment below ; and now apprehending that this was not correct practice, on an affidavit of the above facts,

It seems that on issue of fact upon a writ of error, and verdict for the plaintiff, the rule for reversing the judgment is not a common rule.

S. Starkweather, for the plaintiff, moved (*ex parte*) to vacate the common rule, and enter a rule for reversal as upon a special motion.

Curia. Take your rule.

Motion granted.

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Jackson
v.
Dains.

DEXTER *against* HOOVER.

Title of the
cause in the
court below
amended both
in the certio-
rari and the
affidavit, on
which it was
grounded.

ON certiorari to a Justice's Court. Jacob I. Hoover im-
pleaded Dexter before a Justice, and obtained judgment
against him. Dexter employed an attorney to prosecute a
certiorari to this Court, who, by mistake, drew the affidavit
and certiorari in the name of James S. Hoover, instead of the
true name, Jacob I. Hoover; and on the certiorari being
served upon the Justice, he told the plaintiff's attorney, that
he should return that there was no such cause before him as
that described in the papers; and a motion was now made
to amend the title of the affidavit and writ so as to make
them agree with the proceedings below, in the name of
Hoover.

O. G. Otis, for the motion, cited 1 Sellon's Pr. 98, 99.
Stevenson v. Donovas, (2 B. & P. 119,) *Mestaer v. Hertz*,
(3 M. & S. 450.)

G. H. Feeter and *N. S. Benton*, contra.

Curia. Let the plaintiff make a supplementary affidavit
in the true cause, stating the same facts as are contained in
the original affidavit; let the writ be amended and a copy of
the supplemental affidavit be served on the Justice, who
must return thereto, as if it were an original affidavit. But
the amendment must be on payment of costs.

Rule accordingly.

JACKSON, *ex dem.* DAINS and others, *against* DAINS.

The usual
clause in the
act dividing a
county, that
the division shall not affect any suit or action, &c. (Vide sess. 46, ch. 30, s. 2, in relation to
Yates county,) applies to the venue, and retains the place of trial in the old county.

EJECTMENT for land situate in the county of Yates. The
action was commenced while Yates was a part of Ontario,

and the venue was laid in the latter county. The lessors of the plaintiff, and the defendant, reside in Yates county, and the defendant has several material witnesses residing there. On an affidavit of these facts, and that the defendant has a good defence on the merits, as advised, &c.

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v.
Osborn.

W. M. Oliver, moved to change the venue from the county of Ontario, to the county of Yates.

A. P. Vosburgh, contra, relied on the first proviso in the second section of the act to erect the county of Yates, (sess. 46, ch. 30,) which declares that nothing contained in that act shall be construed to affect any suit or action, in any Court whatsoever, commenced at the time of its passage.

Oliver, in reply, said the object of the proviso referred to, was merely to prevent any suit being discontinued by the separation; and it will be satisfied by giving it this construction.

Curia. We think differently; and that the proviso means that no action shall be affected by the change, as to the place of trial, as well as in every other respect.

Motion denied.

PLATT *against* OSBORN & HUTCHINS.

ASSUMPSIT for money had and received. The action was brought to recover back money which had been rightfully received by the defendants, as trustees of a school district in the town of Louisville, in the county of St. Lawrence, under a resolution of the inhabitants of that district, imposing a tax on the plaintiff and others for the intended purpose of building a school house; but which resolution was afterwards rescinded and the purpose of building the school house was utterly abandoned, and no expense was incurred

Statutes giving double costs to certain officers who succeed in actions brought against them, "for or concerning any matter or thing done by virtue of their offices," (as in sess. 43, ch.

122, s. 2, relative to school trustees,) apply only to acts of *mal-feasance*, not to those of *non-feasance*; as detaining money which they may have officially received.

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under the resolution. The suit was brought on the ground that the consideration of the payment had thereby failed, whereby the money, *ex æquo et bono* belonged to the plaintiff. On trial, at the last circuit in St. Lawrence county, the plaintiff was nonsuited; and now, on affidavits showing the above facts,

W. H. Maynard, for the defendants, moved for double costs. He relied upon the act, (sess. 43, ch. 132, s. 2,) passed 30th March, 1820, giving double costs to trustees of school districts when they succeed in an action brought against them, *for, or concerning any matter or thing done by virtue of their office.*

J. Platt, contra. The words of the statute import some *act of misfeasance*, not merely a *non-feasance*. There is a similar statute in England relative to the overseers of the poor, and yet it was holden not to apply to an action of assumpsit for the non-payment of the price of goods sold to them. (*Blanchard v. Bramble*, 3 M. & S. 131, 2 Dunl. Pr. 732.)

Maynard, in reply. The statute is *for or concerning any matter or thing, &c.* Here was an act done by the defendants in virtue of their office. The money was received and withheld by them as trustees. In assumpsit against a Sheriff, for money received by him as an officer, I believe the Court have allowed him double costs on a nonsuit or verdict passing in his favor.

Curia. The case of *Blanchard v. Bramble*, (3 M. & S. 131,) is in point, and contains the true distinction. In construing this and the like statutes, allowing double costs, there is a distinction in reason, as well as authority, between acts of *misfeasance*, and those merely of *non-feasance*. The latter is often a mere omission to fulfil a contract, which does not call for the protection of the statute.

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GALLEN against KEARNY.

Gallen
v.
Kearny

A VERDICT having been rendered for the plaintiff, a motion was now made for a new trial upon the ground of newly discovered evidence; and the affidavits of several witnesses were produced tending to impeach the plaintiff's claim, which witnesses the defendant swore he knew nothing of till after the trial.

Counter affidavits will not be heard in support of a motion even as to the character of witnesses.

On the part of the plaintiff, affidavits were read, among others, impeaching the credibility of one of the defendant's newly discovered witnesses, and tending to show that others of his pretended witnesses were not in existence, and that the defendant had imposed fictitious affidavits upon the Court, by procuring some individuals to make the affidavits in feigned names.

P. Ruggles and A. Spencer, for the motion.

A. Burr, contra.

At another day, *A. Spencer* proposed to procure and read counter affidavits to support the credibility of the witness impeached, and show that the others were real persons. He said the affidavits upon the other side were a surprise upon him at the argument, and he was not then prepared with authority to show that counter affidavits were admissible. Since that time he had examined *Pomroy v. The Columbian Insurance Company*, (2 Caines' Rep. 260,) which established the admissibility of the affidavits to impeach the credibility of the witnesses, and he found by a note at the end of that case, that evidence is also admissible to sustain it.

Curia. It is contrary to the uniform practice, to receive counter affidavits in support of a motion. This has never been done even in support of character; and if their admissibility were matter of discretion, we think it would be an abuse of that discretion to hear them.

Motion denied.

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The People
v.
Supervisors of
Cayuga.

THE PEOPLE *against* THE SUPERVISORS of the Coun-
ty of CAYUGA.

An order removing a pauper, appealed from, and abandoned by the town who remove, who consent to take back the pauper without trying the appeal, is not conclusive as between that town and the county.

The latter is not protected by it from maintaining the pauper as one having no residence in the state.

Where a magistrate makes an order to maintain a pauper as a non-resident of this state, and unable to be removed, this it seems is conclusive upon the board of supervisors.

AN alternative mandamus had issued to the defendants commanding them to allow to the overseers of the poor of the town of Aurelius, in the county of Cayuga, the expenses of supporting four paupers, which were claimed to be a proper county charge, on the ground that they had no settlement in this state.

In their return, the defendants, without denying that the expenses had been properly incurred under the order of a magistrate, pursuant to the 25th section of the act for the relief and settlement of the poor, (1 R. L. 287, 8,) stated that the overseers of the poor of Aurelius, had procured an order for the removal of the paupers to the town of Farmington, in the county of Ontario, as their place of legal settlement, which order was executed by a removal of the paupers to the latter place; that the overseers of Farmington having appealed from this order to the General Sessions of the Peace of Cayuga, the overseers of Aurelius took back the paupers, and supported them, but neglected to try the appeal; that they rejected the application of the overseers of Aurelius, on the ground that until the order of removal was reversed, the paupers must be adjudged legally settled in Farmington.

The return also stated that a second application to the Supervisors, to allow the expense of these paupers, had been rejected, not only upon the ground above stated, but also on the ground that one E. a convict in the state prison, had been examined on oath, before the justice, and swore that the paupers had no fixed place of settlement or legal residence.

On this return it was submitted whether a peremptory mandamus should go.

Per Curiam. The first question upon the return is, whether the order, which was withdrawn, is to be deemed conclusive as to the settlement of these paupers.

Whatever the effect might be as between Aurelius and Parmington, there cannot be a doubt as between Aurelius and the county. Here was an order of removal, which the parties abandoned by mutual consent. It was like a party's giving up a judgment intended for his own benefit. As to third parties, it threw the question entirely open, to be settled upon its merits whenever it should arise; and this was so held in *Rex v. Inhabitants of Llanrhydd*, (Burr. Sett. Cas. 658.) The order was *deserted*.

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v.
Supervisors of
Cortland.

Whether the convict was or was not examined, does not appear from the return to have been material. For aught that appears, there was other and competent evidence on the subject, and we will intend that there was such evidence till the contrary appears. Besides, could the question be raised collaterally, by the board of Supervisors? It had been passed upon by a magistrate. Could his adjudication be questioned till regularly set aside? This we are by no means prepared to accede.

The return is insufficient, and a peremptory mandamus must go.

Rule accordingly.

In the matter of WILLIAM MALLORY, late Clerk of CORTLAND County, *against* THE SUPERVISORS of the same County.

At the last term a rule was obtained requiring the Supervisors of Cortland county to show cause, on the first day of the present term, why a mandamus should not issue against them commanding them to allow Mr. Mallory's account for his services as Clerk of the court of oyer and terminer and general sessions of the peace of that county, from May, 1815, to August, 1819. The account had been presented to the board of Supervisors of that county, and disallowed by them on the ground that no compensation is allowable by law.

The clerks of oyer and terminer, and general sessions of the peace, are not entitled to compensation for their services rendered to the public, except in the city of New York.

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v.
Supervisors of
Cattaraugus

J. A. Spencer, now moved that the rule be made absolute. He cited *Bright v. The Supervisors of Chenango*, (10 John, 242.)

J. Koon, contra, cited 1 R. L. 400, s. 10, which directs the exchequer to audit the bills of the Clerk of oyer and terminer and general sessions in the city of New York; the 7th section of the act of April 21, 1818, (4 St. Laws, 306 c.) directing all fines to be paid to the County Treasurer, for the use of the county; the first section of the act of April 2 1819, (5 vol. Laws, 96 a.) which provides that the statute last cited shall not affect the fees of the Clerk of the city of New York. The second section then provides that his fees shall be audited by the General Sessions.

He said he could find no statute giving fees to the Clerks of other counties. By a special provision in favor of the Clerk of New York, the Legislature denied that these fees were due upon any general principle. Grand jurors and witnesses would be equally entitled to pay.

The case of *Bright v. The Supervisors of Chenango*, is distinguishable from this. The services there, were for the direct benefit of the county; here they were done for the general benefit of the state.

Spencer, in reply, said the act of 1810 (sess. 33, ch. 196, s. 7) denied fees to county Clerks for services in criminal prosecutions, and expressly directed the board of Supervisors not to allow any compensation. The revision of 1813, contains no such provision, but leaves the case within the general principle established in *Bright v. The Supervisors of Chenango*, that where services are performed for the benefit of the county, they form a proper subject of compensation through the board of Supervisors.

Curia, per WOODWORTH, J. Before the revision of 1813, the act regulating the fees of the several officers and ministers of justice within this state, (2 K. & R. 76,) allowed fees to the Clerk of the oyer and terminer for certain services; but there was no statute providing for the manner in which these were to be paid. The practice was, for the board of Super-

visors to allow them as a part of the contingent expenses of the county, till forbidden by the act of 1810, (sess. 33, ch. 196, s. 7.) The law stood thus till 1813; and I remember that this 7th section was included in the revised bill then submitted by the revisors for re-enactment, but struck out by the Legislature. They probably thought that as the fee bill was omitted, this negatived an intention to allow any thing, and there was no need of continuing the express prohibition.

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v.
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Broome.

Since that time, if these charges are admissible, it must be upon the general principle contained in *Bright v. The Supervisors of Chenango*, that compensation should be allowed where the service rendered was specially for the benefit of the county, and for which other provision had not been made. But the course which the Legislature took with the revised bill, evinces that they did not mean to allow any compensation.

The same reasoning applies to a claim for services as Clerk of the sessions. There is no fee bill in the statute. The same Clerk serves for both courts; and the Legislature, doubtless, intended to leave him on the same footing, as to his public services, in each. The motion must accordingly be denied.

Rule discharged.

In the matter of A. DOUBLEDAY, late Clerk, *against* THE
SUPERVISORS of BROOME County.

J. A. COLLIER, moved for a rule to show cause why a mandamus should not issue to be directed to the Supervisors of Broome county, commanding them to allow the account of A. Doubleday, late Clerk of that county, for his services as Clerk of the sessions and oyer and terminer from September, 1817, to December, 1820, in engrossing the minutes

Clerk of oyer and terminer and general sessions is entitled to compensation for engrossing and entering the minutes of these courts; Which the supervisors should audit.

Where services are rendered for the benefit of the county, and no specific mode of compensation is provided, they should be audited by the supervisors as a part of the contingent charges of the county.

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v.
Supervisors of
Broome.

of these courts, and copying and entering the same. He read an affidavit, showing that this account had been presented to the board of Supervisors of that county, and disallowed on the ground that no compensation is allowable by law, for these services.

He said he should not detain the Court by any remarks upon the propriety of the claim, as the subject had already been discussed at the present term. (Vid. the next preceding case.)

WOODWORTH, J. I think this case distinguishable from the last. The charge is not for services performed strictly as Clerk in court, but about recording the minutes which he had before officially taken. This business may be, and usually is done out of court, or in vacation. It is a benefit, and indeed necessary for the county, that this should be performed; and we have no evidence that the Legislature intended it should be done gratuitously. A similar application was made in October term, 1822, *ex parte* the Clerk of Westchester, and a rule granted to show cause. I think the case is within the principle laid down in *Bright v. The Supervisors of Chenango*, (18 John. 242,) that where the service is rendered specially for the benefit of the county, and no specific provision has been made for payment, they constitute a part of the contingent charges of the county, to be audited by the board of Supervisors. This rule was fully considered in the case cited; and the Court intended that it should apply as broadly as the language in which it is expressed.

SAVAGE, Ch. J. concurred.

SUTHERLAND, J. dissented. He thought this case distinguishable from that of *Bright v. The Supervisors of Chenango*, which has gone far enough. An allowance was there made for extraordinary services which did not devolve upon the relator as Clerk. He acted in the light of a commissioner; and it was the same thing, as if any other person had been appointed to purchase the books and transmit the notices. But here the charge is for performing an ordinary

duty, belonging to the County Clerk. Acting as Clerk of the sessions and oyer and terminer, is a part of his duty. The Legislature must have known this to be so. It is as plainly imposed upon him by law, as that he should be Clerk of the Common Pleas; for which the Legislature have provided specifically. The statute even provides that he should be paid as Clerk of the sessions, for subpoenas granted to the defendant in criminal cases, (2 R. L. 147, s. 10,) but it has omitted to make any provision whatever for a compensation, when he acts in the same cases for the public. Is not this a very strong legislative expression, that the compensation of the Clerk, for his other services, shall be considered an equivalent for the whole? He takes the office subject to the burthen of performing his duties in the sessions and oyer and terminer gratuitously, or for what he receives in other respects. There is another feature in our statutes which strengthens this consideration. An allowance for public services, in criminal causes, to the Clerk of oyer and terminer and sessions in the city of New York, is specifically provided for by the statute, (2 R. L. 18.) This was, doubtless, upon the ground that his compensation for other duties was not an equivalent for both.

I do not think the services of Mr. Doubleday, in this instance, were extraordinary and unofficial within *Bright v. The Supervisors of Chenango*. That was a case of buying books for the county, and sending notices of pedlar's licenses to Judges and Justices. The duties were not only unofficial, but required disbursements in their performance; but neither is the case, with regard to the services for which compensation is now claimed. It may be very reasonable that Mr. Doubleday should be paid; but this is a consideration which belongs solely to the Legislature. Until directed by them, the allowance should not be made.

Rule to show cause.

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Russell
v.
Whipple.

RUSSELL *against* WHIPPLE.

An instrument in writing thus: "Due L. R. or bearer, &c., 200 dollars and 26 cents, for value received," is a good promissory note, within the statute of Ann.

In declaring on a promissory note, it is enough to allege that the defendant made his certain note in writing, &c. without averring that he delivered it.

ASSUMPSIT on note, by payee against maker. The plaintiff averred that the defendant made his certain note, in writing, in the words and figures following, to wit: "Due Lanson Russell, or bearer, one day from date, two hundred dollars, twenty-six cents, for value received; as witness my hand, this sixth day of January, in the year of our Lord 1823." By means whereof, &c., but did not aver that this note had been delivered.

Special demurrer and joinder, assigning the following causes;

1. That this was not a promissory note within the statute, (1 R. L. 151,) though declared on as such, (a)

2. That the declaration should have shown a delivery of the note.

It was answered to the first point, that this instrument had all the technical requisites of a promissory note, except a promise to pay *expressed*; and the following authorities were cited to show it a good note within the statute: 1 Chit. on Bills, 243, n. (1) *Shuttleworth v. Stevens*, (1 Campb. Rep. 407,) *Allan v. Mawson*, (4 id. 115,) *Brown v. Gilman, et al.* (13 Mass. Rep. 158,) *Fisher v. Leslie*, (1 Esp. Rep. 426,) *President, &c., of Goshen Road v. Hurtin*, (9 John Rep. 217,) *Jerome v. Whitney*, (7 id. 321,) and 2 Ld. Raym. 1445.

In answer to the second point, *Churchill v. Gardner*, (7 T. R. 596,) and *Smith v. McClure*, (5 East, 476.)

E. S. Lee, for the plaintiff.

D. D. Barnard, for the defendant.

The demurrer was noticed as frivolous, and being accordingly brought on out of its place on the calendar, *the Court*

(a) Vide *Saxon v. Johnson*, 10 John. Rep. 418

thought it too plain for argument in its regular order, and rendered

Judgment for the plaintiff

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Feb 1824.

Niskayuna
v.
Albany.

THE OVERSEERS of the Poor of the town of NISKAYUNA
against THE OVERSEERS of the Poor of the City of AL-
BANY.

ON certiorari from the general sessions of the peace of the county of Albany. The Court below, on appeal, affirmed an order of two Justices, removing Gerrit Clute, his wife and three infant children, from the city of Albany to the town of Niskayuna.

On the hearing before the sessions, (March term, 1823,) the counsel for Niskayuna admitted that the grandfather of Clute, the pauper, had a settlement in Niskayuna, and relied upon showing that his father Jacob Clute, acquired a settlement out of that town, and indeed, that he was actually settled in Albany, by serving there as an apprentice; or if not, that Albany had acknowledged him as a pauper of that city, by receiving, entertaining and supporting him in the almshouse of that city till he died.

D. C. Groat, swore, that the father of the pauper died 5 or 6 years ago, aged about 70 years: the pauper, G. Clute, is now aged about 50 years.

The counsel of Niskayuna then offered to show the apprenticeship of the father, by parol. This was objected to, but admitted *de bene esse*; and

If it do not appear that one has gained a settlement in his own right, his settlement follows that of his father:

But a change in the settlement of the father, will not affect that of the son, if the father's settlement is obtained after the emancipation of the son.

What shall amount to an emancipation.

The grandfather had a settlement in N.: his son's settlement follows the father's, and the son not having gained a settlement in his own right, the grandson's is in the same place.

To acquire a settlement by apprenticeship, the service must be under an indenture, or a deed, contract or writing not indented; a parol binding is not sufficient.

The place of birth is, *prima facie*, the place of settlement; but if the father's settlement be in another place, the settlement of the child follows his.

It appeared that at the Albany almshouse, certain books are kept in which the names of paupers, &c. are entered; and also quarterly returns made to the corporation. To show that a pauper was settled at Albany, by being entered and recognized as a pauper of that city, the almshouse books being (as insisted) burnt, parol proof of their contents was offered; held, that admitting the books to have been burnt, parol was not the next best evidence but the quarterly returns should be produced.

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Groat stated, that the father was sworn before him and another, as magistrates, with a view to his removal as a pauper; that his evidence was reduced to writing, but where the affidavit is now, he does not know; that the father then swore, that he served one Goervey (since dead) upwards of two years, as an apprentice, in Albany, and then ran away and returned to his father's, who also drove him away, after which he shifted for himself; does not know that he spoke of having seen any indenture, but he said he was bound by his father to Goervey. He also swore, that he was born upon Mills' Island, near the city.

N. Bassett, a constable of Niskayuna in 1812, swore, that during that year, on an order of removal, he conveyed the father from Niskayuna to the almshouse in Albany, where, as the witness was afterwards informed by the superintendent and others, he died.

Bassett's testimony was objected to as inadmissible, but received *de bene esse*.

D. Osborn swore, that in the fall of 1813, he saw the father in the almshouse, and soon after heard that he died there.

J. Strong swore, that he saw the name of Jacob Clute, the father, entered as the name of one of the paupers in a book kept at the almshouse. This was since 1815.

Evidence was given of a declaration of Wendell, the superintendent of the almshouse in 1815, that there had been a fire there by which the records were burnt up; that Wendell is since dead.

George W. Welsh, superintendent of the almshouse at the time of the hearing, produced a book, which he swore he received from the brother of Hewson, the late superintendent, (deceased,) and which purported to be a book of the almshouse, and to contain the names of paupers belonging to that establishment, from 1806 to 1814, inclusive, in which the name of Jacob Clute was not to be found; that there is no other general book in which the names of paupers are

kept; that he makes a quarterly return to the Common Council containing the names of all the paupers remaining in the almshouse, and opposite the name of each pauper, is stated the age of the pauper, the time of admittance, death, &c.; that he is informed it was customary for his predecessors to make these returns, as he now does; and the present corporation law requires this to be done. At the June term, 1823, the sessions affirmed the order.

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The counsel for Niskayuna admitted that Clute, the pauper, was married about 30 years ago, at Guilderland, (then Watervliet,) and had several children.

J. V. N. Yates, for the plaintiffs in error. The father's service for two years, as an apprentice, in Albany, is established. Parol evidence was admissible under the circumstances of the case. (*Jackson v. Root*, 18 John. Rep. 60, 73. 1 Phil. Ev. 176, 178. *Rex v. Long Buckby*, 7 East, 45. Burr. Set. Cas. 151. 1 Const, 490. 1 John. Cas. 488, per Spencer, C. J. 1 Caines' Cas. Err. 27. 10 John. Rep. 377. *Giles v. Baremore*, 5 John. Ch. Rep. 550.) The lapse of time, the death of Goervev and of Jacob Clute, and the fire at the almshouse, have deprived us of any other proof than what we have given. *Rex v. Morton*, (4 M. & S. 48,) is in point. The father has removed to Albany, upon his evidence of having served an apprenticeship; the removal was acquiesced in, and became conclusive upon them. (3 Burns' J. 597, and the cases there cited.) The service would confer a settlement, though not under an indenture. (Van Schaick's ed. of Colonial Laws, 752.) Service under defective indentures gains a settlement. (*Overseers of Hudson v. Overseers of Taghkanac*, 13 John. Rep. 245.)

But Albany recognized and supported the father as their pauper; and in this view, no matter how he came there. (*Rex v. Wakefield*, 5 East, 335. *Same v. Chadderton*, 2 East, 27. *Same v. Chatham*, 8 East, 498. *Fort Ann v. Kingsbury*, 14 John. Rep. 367. *King v. Butler*, 15 John. Rep. 281.) The order need not have been produced. It was not relied upon as binding in itself, but merely to show the character in which the pauper was received. Parol proof was competent for this purpose. (1 Phil. Ev. 218,

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219. *Livingston v. Delafield*, 1 John. Rep. 522. *King v. Butler*, 15 John. Rep. 281. *Rex v. Wakefield*, 5 East, 335, 6.) But the order of removal was probably destroyed by the fire in the almshouse, which renders parol proof admissible. (*Jackson v. Neely*, 10 John. Rep. 374.) The declarations of the superintendent of the almshouse, were good evidence of the destruction. (Peak's Ev. 74. *Fairlie v. Hastings*, 10 Ves. 127.) No objection was made for want of notice to produce the order. But the nature of the proceeding was a sufficient notice that the order would be required. (*Jolley v. Taylor*, 1 Campb. Rep. 143. *How et al. v. Hall*, 14 East, 274. *Bucher v. Jarratt*, 3 B. & P. 143.)

Not was it necessary to produce the quarterly returns. They were mere private papers.

To make the settlement of the grandfather available, it should be shown that he was not only settled in Niskayuna, but that he was settled there at the time of his death.

The son's settlement followed that of the father. His being married 80 years ago, and emancipated does not vary the case, unless he acquired a settlement in his own right.

J. E. Lovett, for the defendant in error, contended,

1. That the proof of the indentures and service as apprentice, was inadmissible. (*Case of The Inhabitants of Bilton*, 1 East, 15. *Rex v. Inhabitants of Warley*, 6 T. R. 534. 4 Com. Dig. Evidence, A. 3, 4. 8 Bl. Com. 368. 1 Phil. Ev. 167, 173, 347. *Carey v. Campbell*, 10 John. Rep. 368. *Rex v. Inhabitants of Eriswell*, 3 T. R. 708, per Grose, J. Burr. Sett. Cas. Case No. 94, 102, 104, 173, 203, 227, 269. 2 East, 28, per Ld. Kenyon, C. J. 4 Burn. J. 403. Ld. Raym. 1117.)

2. Failing to show a settlement by indenture and apprenticeship, it cannot be converted into a hiring and service within the colonial law. (4 T. R. 770. 4 Burn. J. 418, 419, 752. Burr. Sett. Cas. No. 173, 203. 1 Bl. Com. 361. 4 Burn. J. 283.)

3. There is no legal proof that the father was removed to Albany by the order of removal. (Com. Dig. Evidence, A. 4, and most of the authorities cited to the first point. 1 Phil. Ev. 388.)

4. If the father was entertained as a pauper of Albany, it communicated no settlement to the son, who was several years before emancipated. (5 T. R. 586. 3 T. R. 386. 4 Burr, J. 239. 1 Bl. Com. 363, note.)

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5. If the almshouse books were destroyed, evidence should have been given from the quarterly returns. (2 Caines' Rep. 106. 6 T. R. 247. Burr. Sett. Cas. No. 93, 197, 251. 1 East, 527. 5 T. R. 670.)

Curia, per SAVAGE, Ch. J. The question is, where was the last legal settlement of Gerrit Clute, the pauper?

It is admitted that his grandfather was settled in Niskayuna.

It does not appear from the return, that the pauper ever gained a settlement in his own right, any where. We must then look back and inquire, where was the settlement of his father? If we admit the parol evidence which was received by the sessions, it appears that Jacob Clute, father of the pauper, was born upon Mill's Island. In what town this island was situate, at that time, does not appear; nor is it, at present, material. The place of the birth is, *prima facie*, evidence of the place of settlement. It remains so, till the settlement of the father is ascertained, and then the settlement of the child is the same as that of the father. (*De-laverghie v. Norton*, 14 John. Rep. 334; *O. of Vernon v. O. of Smithfield*, 17 id. 91.) The father of Jacob Clute was settled in Niskayuna; and the birth of the latter upon Mill's Island did not give him a different settlement. This circumstance, then, does not relieve Niskayuna.

It is next contended that he served an apprenticeship for more than two years in Albany. To gain a settlement in this manner, he must have been bound an apprentice or servant *by indenture, or by deed, contract or writing not indented*; and in consequence of such binding, have served a term not less than two years. (1 R. L. 279.)

The testimony does not show that Jacob was bound in either of these ways. There is no evidence, that any written instrument ever existed, binding him to Goervey. For aught that appears, the binding may have been by parol, in

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which case no settlement would be gained. (*Rex v. Inh. of Abingdon*, Burr. Sett. Cas. 292.) The evidence admitted by the sessions was certainly too loose; but in the view which I have taken of the case, it is not necessary to particularize. Jacob Clute had a settlement in Niskayuna, because his father had. He did not acquire a different settlement by birth, or by apprenticeship.

It is contended, however, that he was acknowledged as a pauper of Albany, in 1812; that he was received on an order of removal from Niskayuna, and supported in the almshouse, till 1815, when he died there. These facts are proved by parol, but the books produced disprove them; and the appellants have not brought forward the best evidence in their power. They might have produced the quarterly returns of the superintendent, if they supposed that any of the books were destroyed.

They omitted to give notice to produce the order of removal, and were, therefore, not entitled to give parol proof of its contents.

But even if there were no objection to the competency of the evidence, the facts proved by Niskayuna would not make out a settlement of Gerrit Clute in Albany, by showing that his father had one there in 1812. The pauper is now about 50 years of age; in 1812, he must have been 39. He had been long before emancipated, and his settlement did not follow that of the father, though the latter may afterwards have gained one in Albany.

I am, therefore, of opinion, that the order of the sessions be affirmed.

Judgment of affirmance.

ALBANY.
Feb. 1824.Van Antwerp
v.
Newman.VAN ANTWERP, Sheriff of ALBANY, *against* NEWMAN.

ERROR from the Mayor's Court of the city of Albany. The action in the Court below, was brought by Newman against Van Antwerp. The declaration contained two counts. The first count averred, that Newman was owner and proprietor of divers goods and chattels, (enumerating them,) of the value of, &c., which had been let to hire to one Husted, for a certain term, and were in Husted's possession, as lessee thereof; but that the defendant, knowing the premises, and intending to injure Newman in his reversionary interest, while the same goods were in possession of Husted, and before his term had expired, seized and took the goods from and out of the possession of Husted, and converted and absolutely sold and disposed of the goods to the defendant's own use.

The second count was trover for the same articles.

Plea, the general issue.

On the trial, the facts set forth in the first count were proved. The sale was made and the action commenced during the term, for which the goods were out upon lease. The sale was of the goods as the absolute property of Husted, and was made by the defendant as Sheriff of Albany, in virtue of a *fi. fa.* against Husted; without particularizing his special property as the subject of sale. Notice of Newman's interest was given to the Sheriff at the time of the sale. The defendant below moved for a nonsuit, which was denied, and the Court charged the jury in favor of the plaintiff, who found accordingly. The defendant excepted to this decision and charge.

The sheriff may sell a term in goods or chattels, upon execution against the lessee; and the purchaser acquires a right to use the goods during the term.

If the sheriff sell the goods as the absolute property of the tenant, not mentioning his special property, though he know of it, no action lies against him for this at the suit of the lessor; for it does not divest the lessor's right or impair his reversionary interest.

Aliter, it seems, if he destroy the goods or otherwise injure them.

The sheriff cannot seize and sell the property of A. upon an execution against B.

J. L'Amoureux and *J. Koon*, for the plaintiff in error, insisted,

1. That the Sheriff had a right to sell the term. (*Gordon v. Harper*, 7 T. R. 9.)

2. It was not necessary at the time of the sale to give notice that the tenant's interest alone would be sold. That is

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a question between the tenant and the purchaser. The landlord has nothing to do with it. (2 T. R. 376. 1 John. Rep. 471. 6 id. 44. 7 id. 535.)

3. At any rate, no action would lie during the pendency of the lease. (1 Esq. N. P. Gould's ed. pt. 2d, 129. *Gordon v. Harper*, 7 T. R. 9, close of Ld. Kenyon's opinion.)

D. L. Van Antwerp, contra, cited *Manning's case*, (8 Co. 96 b.) *Storm v. Livingston*, (6 John. Rep. 44,) 2 Chit. Pl. 329, 330, 2 Saund, 47, 4 T. R. 489, 7 id. 9, and 1 Chit. Pl. 49, 141.

Curia, per *Savage*, Ch. J. The first question which presents itself is, whether the lessee of goods and chattels for a term, has an interest which is the subject of a sale on execution.

It is well settled in the English courts, that the lessee's interest in goods may be sold, (*Gordon v. Harper*, 7 T. R. 11, *Ward v. Macauley*, 4 id. 489, *Manning's case*, 8 Co. 191,) and the purchaser is entitled to the beneficial use of them during the term.

The next question is, whether the Sheriff, by a sale absolute in its terms, on an execution against the lessee, can divest the lesser of his interest?

It is contended on the part of the defendant in error, that the purchaser at the Sheriff's sale acquires a complete title, and will hold the chattels thus purchased against the lesser, or general owner; and several authorities are cited to support that position. The cases cited decide, that when goods of a defendant are sold on execution, and afterwards the judgment is reversed, though the judgment is, that the defendant shall be restored to all he hath lost, &c., yet in such case the purchaser shall hold the property, because the Sheriff, at the time of the sale, had lawful authority to sell, and, therefore, the defendant shall not be restored to the possession of the goods themselves, but shall receive the value of them.

In a note to *Matthew Manning's case*, (8 Co. 191,) there is a case (*Amner v. Eddington*) in point. *Riopoint* held a

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lease for 99 years, of certain houses in London. By his will he devised them to his wife for her life, and after her death, to her children unpreferred. After his death, his wife married Fulleshurst; and on an execution against Fulleshurst, the Sheriffs sold the term (by which I understand the lease for 99 years) to Loddington. Afterwards, the judgment on which the execution had issued, and by virtue of which the sale was made, was reversed, and the wife of Fulleshurst died. After her death, her daughter unpreferred, Alice Fulleshurst, entered and made a lease to the plaintiff, Amner. After several arguments in the Common Pleas, three several points were adjudged: 1. That the executory devise was good; 2. That it could not be destroyed by a sale, either by the wife or by the Sheriffs; and 3. That the sale by the Sheriffs should stand, notwithstanding the reversal, and the plaintiff in error should be restored to the value; for the Sheriffs, who made the sale, had lawful authority to sell, and by the sale, the vendee had an absolute property in the term *during the life of the wife*; and judgment was given for the plaintiff, which was afterwards affirmed, on a writ of error, in the King's Bench.

So in the case under consideration, the interest of the lessor cannot be destroyed in virtue of a sale either by Husted or the Sheriff. The purchaser from one or the other, possesses the interest of Husted till the expiration of the lease, and then the property reverts to the original owner. A contrary doctrine would give the Sheriff power, by virtue of an execution against one man, to take the goods and chattels of another, and by a sale, to divest the owner of his title.

That the correct doctrine is laid down in this note to *Manning's case*, we have the authority of Lord Mansfield, in *Cooper v. Chitty* and *Blackiston*, (1 Burr. 34,) where he says, (speaking of *Manning's case* among others,) "None of these cases authorize the Sheriff to sell the goods of a third person; and it is admitted the vendee is not protected here, because at the time of the sale, the Sheriff had no authority to sell." So in the case under consideration, the Sheriff had no authority to sell any thing but the goods of Husted. The

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vendee is protected in his purchase as between the parties to the judgment, but not when the interests of third persons are concerned. So President Pendleton, in *Burnley v. Lambert*, (1 Wash. Rep. 313,) commenting on *Manning's case*, asks, "But if an execution issue against the goods of A, and the Sheriff seize and sell the property of B, will it be said that this is done by lawful authority? surely not." In *Carter v. Simpson*, (7 John. Rep. 536,) the Court say that no case admits a title in the purchaser, where the Sheriff acted without authority. In *Storm v. Livingston*, (6 John. Rep. 44,) the decision in favor of the purchaser rests on the want of evidence of demand and refusal, or actual conversion, one of which was necessary, because he came lawfully into possession, that is, by color of law. That case is no authority for saying that the purchaser acquired a good title, but the contrary.

My opinion, therefore, is, that the Sheriff had authority to sell the interest of Husted; that it was not in his power to divest Newman, the lessor, of his property in the goods; nor has he done so. Newman, therefore, has no right of action against him. When the suit was commenced, Newman could not know that his goods would not be restored to him at the expiration of the lease. He was, therefore, premature in bringing his suit, unless an injury had been done to his reversionary interest. Had the Sheriff or any other person destroyed the goods, in that case, it would be apparent that they could not be restored, and probably an action would lie at any time after the destruction of them; but such is not this case. I am of opinion, that the judgment in the Court below should be reversed.

Judgment reversed.

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v.
Stafford.JACKSON, *ex dem.* BEACH, *against* STAFFORD.

EJECTMENT, tried at the Saratoga Circuit, Dec. 1823, before his honor, R. HYDE WALWORTH, Circuit Judge. The action was commenced in the vacation after August term, 1823, in behalf of Beach, as *mortgagee*, against the defendant Stafford, the *mortgagor* of certain premises in the town of Saratoga, in the county of Saratoga. On the trial, the plaintiff gave in evidence the mortgage, which bore date April 17th, 1817; also a notice to quit, in these words:

“Mr. Samuel Stafford, Sir, You are hereby required to quit and deliver up, or cause to be delivered to me, the premises you mortgaged to me, situate in the town of Saratoga, by the *eleventh* day of December next. June 10th, 1818.

Yours, &c.

Miles Beach.”

The service of this notice being proved, six months before its expiration, the counsel for the defendant raised two objections. 1. That the lessor of the plaintiff had waived his notice to quit by more than 4 years delay to bring an action after the notice was given. 2. That the notice to quit was defective, in not directing the mortgagor to quit on a day in the year corresponding with the date of the mortgage. He insisted that this was like a tenancy from year to year, in which case the notice to quit should have respect to the expiration of the current year.

The Circuit Judge overruled both these objections, and denied an order to stay the proceedings, for the purpose of enabling the defendant to move for a new trial on a case made containing the above facts.

On appeal to this Court, they were clearly against the defendant, and also denied an order to stay proceedings.

Judgment for the plaintiff.

(s) *Vid.* Wood. & T. 218, and cases there cited.

A delay of more than 4 years to bring ejectment, after notice to quit by a mortgagee to the mortgagor, is not a waiver of the notice.

The notice to quit by a mortgagee to a mortgagor, need not direct the mortgagor to quit on a day in the year corresponding with the date of the mortgage.

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A. M. GRIFFIN, gentleman, one, &c., against M. MITCHELL
gentleman, one, &c.

The act (sess. 41. ch. 94, s. 6 and 7,) empowering a justice of the peace to render judgment on confession to 100 dollars, and prescribing the manner in which this shall be done, and declaring the judgment void unless its provisions are complied with, did not require a particular of the items, oath, &c. except where the judgment exceeded 50 dollars, (exclusive of costs.) But see the statute, sess. 47, ch. 238, s. 12 & 13, which now requires this where the judgment exceeds 25 dollars, (exclusive of costs.)

Omitting a particular of the items, oath, &c. renders the judgment void as to creditors only; but it is valid and binding upon the defendant.

FALSE imprisonment. Plea, that on the 8th day of February, 1822, one L. recovered judgment before a Justice of the Peace, for \$29 21, and had execution thereupon, returnable in ninety days, against Griffin, the plaintiff in this suit, whereon he was imprisoned; and that Mitchell, the defendant in this suit, was the attorney of L. and conducted the suit before the Justice, and caused the plaintiff, Griffin, to be imprisoned, which is the same trespass whereof the plaintiff complains, &c. *Replication*, admitting the truth of the plea, but averring that the judgment was by confession, and that previous to the entering of the same, he the said Griffin did not, as is by law required, set forth the particular items of the demand of L. nor did he make oath, as by law is required, to make such judgment valid and effectual, and by reason whereof it was void, &c.

Demurrer and joinder.

A. M. Griffin, plaintiff, in person.

M. Mitchell, defendant, in person.

Curia, per SAVAGE, Ch. Justice. By the revised laws of 1801, (a) it is enacted "that when any parties shall agree to enter an action before any Justice without any process, the Justice shall proceed to trial in the same manner as if a summons or warrant had issued." Under this act, Justices adopted a practice of entering judgments by confession of the defendant, and this Court sanctioned the practice. (b) By the revised laws of 1813, (c) it is enacted, "that whenever any parties agree to join an issue without process, the Justice shall proceed to try the same as if process had issued." The same practice continued under the latter act, and

(a) 1 K. & R. 493.

(b) *Martin & Chamberlin v. Moss and another*, 6 John. 126. *Nicholls v. Hewitt*, 4 id. 423.

(c) 1 R. L. 388.

also received the sanction of this Court, (d) without regard to the difference of phraseology. *Butler v. Potter*, (17 John, 145,) was a case in which one of these judgments by confession was drawn in question, and has, as we shall presently notice, a still further bearing upon one of the points raised by this demurrer. Judgment had been confessed before the Justice, and he awarded costs to \$5 18; and it was contended that the judgment was void, because he had exceeded his jurisdiction. But this Court said the Justice had jurisdiction to give judgment for costs, and although he erred in giving more than he ought, the judgment was not therefore void. And they laid down this rule, that "where the Justice has no jurisdiction whatever, and undertakes to act, his acts are *coram non judice*; but if he has jurisdiction, and errs in exercising it, then the act is not void, but voidable only." They also cited *Prigg v. Adams*, (2 Salk. 674,) as good law, and predicated their judgment upon it.

The cases cited were previous to 1818. By the act of that year, (e) Justices are expressly authorized to enter judgments by confession of the defendant, for a sum not exceeding 100 dollars. It is required (f) that the defendant set forth in writing the items of the plaintiff's demand, and make oath that he is honestly indebted to the plaintiff, and that judgment is not confessed to defraud any creditor; and if these requisites are not complied with, the judgment is declared void.

It is admitted by the demurrer to the replication, that judgment in this case was entered on the confession of the defendant, and that no statement of the items of the plaintiff's demand, nor any oath, was previously made by the defendant as required by the statute; but it is insisted by the defendant, that for aught which appears by the pleadings, the judgment was rendered under the 25 dollar act. This is contradicted by the execution, which is set forth as returnable in 90 days, and therefore not authorized by any other than the 50 dollar act.

From the phraseology of the statute, it has been doubted whether its provisions are not applicable to all judgments by confession of the defendant, whatever the amount may be; (g)

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(d) *Brom-
aghin v
Thorp,* 15
John. 476
*Butler v. Pot-
ter,* 17 John
145.

(e) *Secs. 41
ch. 94, s. 6.*

(f) *Id. s. 7*

(g) *Cowen's
Treatise, 632.*

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an opinion which derives additional consideration from the fact that it was passed at the same session with the statute requiring a specification to be filed in all cases of judgment by confession on bond and warrant in the Courts of record. We are, however, to construe it in connection with the previous acts relating to the same subject. Without the 6th section of the act of 1818, Justices of the Peace would be authorized to enter judgments by confession to the amount of 50 dollars. The 7th section, which requires the statement of the items and the oath, is confined in its operation to judgments entered by virtue of the 6th section. It follows that the provisions of the 7th section apply to such judgments only as exceed 50 dollars. This construction is strengthened by the 12th and 13th sections. The 12th makes the former provisions applicable, giving the same fees for similar services, and the 13th gives a new fee for entering judgment on confession above 50 dollars. This shows, I think, that the legislature considered Justices, without any special provision beyond that of extending their jurisdiction generally, authorized to enter judgment by confession to the extent of their enlarged jurisdiction.

But even if it were admitted that the present case comes within the provision of the 7th section, it by no means follows that the judgment is to be avoided by the defendant in that judgment, and in this manner.

I have already remarked, that this Court, in *Butler v. Potter*, considered the case of *Prigg v. Adams* good law. That case was, in some respects, similar to the present. False imprisonment was brought for imprisoning the defendant in a judgment entered in the Common Pleas for 5 shillings, for a cause of action arising in Bristol, when an act of parliament had declared that no judgment should be entered in any of the Courts at Westminster, upon such a cause of action, if less than 40 shillings, and if such judgment be entered it shall be void. Upon demurrer, the question was, as it is here, whether the judgment was so far void that the party could take advantage of it in this collateral action; and the Court held that it was not, but that it was only voidable, by plea or error. In this case, however, neither error nor a cer

tiorari will lie, and if it cannot be inquired into collaterally, there can be no inquiry at all. But I think the legislature intended that the judgment should be void as against the creditors of the defendant only. The act was calculated to guard against judgments entered by collusion between the parties; but never meant that the defendant should take advantage of his own wrong, by setting it aside, nor to change well settled principles of law. The process of a Court having jurisdiction of the subject matter, is a protection to the ministerial officers who execute it, though the Court itself may have erred in the exercise of its powers; but if a judgment entered without complying with the provisions of the 7th section be a nullity, then the officer would be a trespasser for executing process regular on its face, and issued by a Court of competent jurisdiction. Such a consequence never could have been intended. On the whole, therefore, my opinion is, that the defendant must have judgment.

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Judgment for the defendant.(1)

(1) Since the above decision, by statute (sess. 47, ch. 238, s. 12 and 13,) a Justice may render judgments by confession for a sum not exceeding 250 dollars; and whenever it exceeds twenty-five dollars, (exclusive of costs) the defendant shall make such confession in writing, and file the same with the Justice; and shall also set forth the items of the demand as far forth as he may be able so to do, and make oath that he is honestly and justly indebted to the plaintiff in the sum to be named in the said judgment, over and above all just demands which the defendant may have against him, and that the confession of judgment as aforesaid is not made for the purpose of defrauding any creditor; and any judgment entered by confession as aforesaid, where the defendant shall not comply with these provisions, shall be void; provided that a non-compliance with such provisions shall not affect the right or title of any *bona fide* purchaser of any goods or chattels, lands or tenements, under any such judgment.

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Feb. 1834.

Jackson
v.
Gumaer.

JACKSON, ex dem. MERRITT and STANTON, against
GUMAER.

In certifying the acknowledgment of a mortgage, or deed, &c., under the statute, (1 R. L. 369, s. 1,) it is sufficient for the officer to say "on, &c., before me, A. B. one, &c., came J. S. to me known, and acknowledged that he executed the above mortgage (or deed) for the uses and purposes therein mentioned," &c., without saying "to me known to be the person described in and who executed the said mortgage," (or deed.)

That the omission of this clause has been extensively practiced in the state, so that many titles would be disturbed by allowing it to affect the certificate, would

perhaps amount to a construction of the act, and at all events would render the court unwilling to listen to an objection for this cause.

Form of such a certificate.

An affidavit of sale under the 8th section of the act concerning mortgages, (1 R. L. 374,) is sufficient if certified in this form: "Sworn before me this 1st day of November, 1821, Geo. Dexter, comar." &c., without expressly certifying that the deponent appeared before him, &c.

The deed to or from a lunatic, before office found, is not void but voidable only; and, therefore, one who is not in privity with the lunatic cannot object his insanity.

The objection that a conveyance of land is void, because the grantor is out of possession, does not apply to a patent or deed of land from the people of the state.

EJECTMENT, to recover 20 acres of land on lot No. 93, in the town of Manlius, and county of Onondaga, tried at the Onondaga Circuit, in June, 1822, before his honor (the late) Chief Justice SPENCER. The plaintiff's declaration contained two demises—one from Samuel Merritt, on the 29th day of February, 1816, and the other from Benjamin Stanton, on the 1st day of January, 1822.

The counsel for the plaintiff introduced as evidence, 1st, a deed from Samuel Merritt to De Witt Rose, for 100 acres of land, including the premises in question, dated February 29, 1816, duly acknowledged and recorded in the Clerk's office of the county of Onondaga: 2dly, a mortgage from De Witt Rose to the people of the state of New York, dated February 29th, 1816, for the aforesaid 100 acres, with an acknowledgment annexed in these words: "Onondaga county, ss. On the second day of March, 1816, before me, Jacob R. De Witt, one of the Judges of the Court of Common Pleas in and for the county of Onondaga, came De Witt Rose, to me known, and acknowledged that he executed the above deed of mortgage, for the uses and purposes therein mentioned. I having examined the same, do allow it to be registered and recorded. Jacob R. De Witt." The counsel for the defendant objected to the mortgage as evidence, on the ground that the certificate of acknowledgment did not state that the officer was acquainted with the person making the acknowledgment, and that he knew him to be the person described

in, and who executed it. The objection was overruled, and the mortgage admitted as evidence.

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The counsel for the plaintiff next offered in evidence: exemplifications of the record of affidavits of the due publication, and posting of a notice of sale of the premises mentioned in the mortgage, and of the sale of the premises and the purchase thereof by the Attorney General, the last of which was objected to by the defendant's counsel, on the ground that the certificate of the officer before whom the affidavit was taken, was defective; that it did not comply with the requisites of the statute. It was in these words: "Sworn before me this 1st day of November, 1821, Geo. Deuster, comsr. &c." This objection was also overruled, and the affidavit admitted as evidence.

The counsel for the plaintiff next offered a deed of release for the 100 acres, from the Attorney General to *the people of the state of New York*, and a patent from *the people of the state of New York to Benjamin Stanton* for the same 100 acres, including the premises in question, dated November 9th, 1821.

The defendant claimed title to the premises under a deed from the Sheriff of the county of Onondaga to him, for all the right and title of Samuel Merritt to the lot No. 93. The Sheriff's sale was made under a judgment in the Supreme Court, docketed in August term, 1816. The judgment and execution, which were referred to and recited in the deed from the Sheriff to the defendant, (being in a cause entitled *Jacob Hadley v. Samuel Merritt*,) were admitted by the plaintiff.

The defendant's counsel then offered to prove that the defendant was in possession and claimed title to the premises under the judgment against Merritt, and his deed from the Sheriff at and before the time when the patent was granted by the people of the state of New York to Benjamin Stanton, for the purpose of showing that the patent was void on the ground of adverse possession, which testimony was objected to by the plaintiff's counsel and rejected by the Court.

The defendant's counsel then offered to prove that De Witt Rose was insane at the time the deed from Samuel

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Merritt to him and the mortgage from Rose to the people were executed, which testimony was objected to by the plaintiff's counsel and rejected by the Court.

The defendant's counsel then offered to prove that a commission of lunacy issued from the Court of Chancery of the state of New York, upon an inquisition taken the 17th day of November, 1818, finding that De Witt Rose had been a lunatic for two years and upwards. This testimony was also objected to by the plaintiff's counsel and rejected by the Court, on the ground that the defendant could not call in question the sanity of De Witt Rose. It was proved by Thomas Rose that Samuel Merritt was in possession of the premises at the time he executed the said deed to De Witt Rose. The cause was then submitted to the jury who found a verdict for the plaintiff.

H. B. Davis, for the defendant, now moved for a new trial, on the following grounds :

1. That the evidence of De Witt Rose's lunacy was improperly rejected.

2. That the affidavit to prove the regularity of the proceedings, under the statute, upon the mortgage, was not made before the proper officer.

3. The proof offered that the defendant was in possession of the land, claiming adversely, at the time of issuing the patent to Stanton, ought to have been received.

4. The certificate of acknowledgment did not comply with the requisitions of the act.

(a) 4 Rep. 123.
(b) 2 Bl. Com.
291, 2. Co.
Litt. 2, b. and
Harg. note 11.
Id. 247, a. b.
and Harg. note
186. *Thomp-
son v. Leach*, 2
Ventr. 198,
208. *Webster
v. Woodford*, 3
Day's Cas. 90.
Rice v. Peet,
15 John. 503.
1 Chit. Pl. 470,
and the cases
there cited.

He said the first point depended upon the question whether the mortgage was void or voidable. The objection to the evidence of lunacy, was the old one contained in *Beverly's case*. (a) The only reasons given in that case are, that a man shall not be received by the law to stultify himself, and disable his own person ; and also, because when a man recovers his memory, he cannot know what he did when he was *non compos mentis*. These are the only arguments there used, and it will be seen that modern authorities have widely deviated from them. (b) The objection of the old law was *ad personam*. It held that the deed was void, but

could not be avoided by the party, though it might be by privies.(c) But this is not the true distinction. It depends on the question whether the deed be void or voidable, as in case of infancy. Such was holden to be the point of inquiry in *Zouch v. Parsons*,^(d) where a third person sought to avoid the deed of an infant. Now the deed of one *non compos mentis* is void ;^(e) and may be treated as a nullity by all persons who might otherwise be affected by it. A committee may regard his acts as void, from the time he is found under the commission to have become lunatic.^(f)

2. The commissioner who takes the affidavit of the sale, is expressly required, by the statute,^(g) "to subscribe his name to a certificate underneath the same, purporting that the person making the affidavit, had appeared before him and made oath to the same." There is a difference between the language of the certificate as required by the statute, and the common *jurat* to an affidavit. Besides, it does not appear that it was sworn before the proper officer. The words "Comsr. &c." do not describe an officer qualified to take affidavits.

3. Evidence of adverse possession was admissible in avoidance of the patent. Neither the state, nor an individual, has power to convey land holden adversely by another. This was conceded in *Jackson v. Hudson*,^(h) where an Indian possession was set up to avoid a patent. The Court assume, that an adverse possession would have avoided the deed if it had been established, and put the denial of such an effect upon the nature of the possession.⁽ⁱ⁾ The state stands, as plaintiff, on the same footing with any other individual. Thus it is enough for the defendant in ejectment, at their suit, to show a title out of the people, though he establish none in himself.^(j) That the people were not in possession at the time of their grant, is a sufficient defence. They had no title except what they claimed under the deed of the lunatic. This being void, the case was the same as if they had previously conveyed all their title to another ; and had nothing to grant. The patent would have been void at the common law. A sale of lands, holden adverse-

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(c) *Beverly's*
case, 4 Rep.
123.

(d) 3 Burr.
1794, 1804.

(e) *Thompson v. Leach*,
2 Ventr. 198,
208. 1 Ld.
Raym. 315, S.
C. 3 Mod. 301,
S. C.

(f) 1 Col-
linson on Lu-
nacy, 413. 1
Fonbl. 42.

(g) *Secs.* 36,
ch. 32, s. 8, 1
R. L. 374.

(h) 3 John.
Rep. 375.

(i) Id. 385.

(j) *The Peo-
ple v. Cutting*,
3 John. Rep. 1.

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(1) 13 John.
488.

(4) 1 R. L.
184, 185, § 1.

(1) 1 R. L.
369, § 1.

(m) 1 R. L.
371.

(o) 2 Green-
leaf, 99, § 1, 2.

ly, by commissioners appointed by an order of Court, under the act for the partition of lands, has been holden void.(1) The people should prosecute their action of ejectment, and recover possession, before they have power to grant. Let us not be told, that lands cannot be holden adversely to them. The contrary is recognized by the statute of limitations. Forty years possession of their lands is a bar of their action.(k) Nothing is better settled than that to bar a claim of lands under the statute of limitations, there must be an adverse holding; and to say that this cannot be as to the state, is to make the act of limitation a dead letter.

4. The certificate of acknowledgment is not in compliance with the statute,(j) which provides "that no such acknowledgment shall be taken, unless the officer taking the same shall know, or have satisfactory evidence, that the person making such acknowledgment is the person described in, and who has executed such deed, conveyance or writing, and that no such proof shall be taken, unless the officer taking the same shall know the person making such proof, or have satisfactory evidence that he is a subscribing witness to such deed, conveyance or writing, and that such witness knew the person who executed the same, all of which shall be inserted in the said certificate of such acknowledgment or proof." The 8th section(m) provides, that it shall not be lawful for the Secretary of State, or any Clerk of any city or county in this state, to record any deed, conveyance or writing, unless the same shall be acknowledged or proved as directed by this act." This mortgage, then, was improperly recorded. The omission to certify that Rose was known to the acknowledging officer to be the person who executed it, is a fatal defect. The statute is imperative that this shall appear in the certificate, and there is no escape from the plain language of this provision. It is salutary in its object, and should be rigidly enforced. It was aimed at the frauds which may be practiced in personating grantors, to which the old statute regulating these acknowledgments was found inadequate, by experience. This will be seen by comparing the present law with the statute of 1768,(n) which omitted the clause in question. This having resulted in numerous

frauds, the Legislature on the 11th February, 1797, interfered by a supplementary act, requiring that the officer, before he certified the acknowledgment, should know, or have satisfactory evidence to identify the party acknowledging, or the witness making the proof, all of which should be inserted in the certificate.(p) This has been continued in the revisals to the present time.(q) The importance of knowledge is obvious. Suppose two men bearing the name of De Witt Rose, one having title and being correctly described in the deed, the other not: if it is enough for the officer to say "I know De Witt Rose," and stop there, it is easy to practice the grossest imposition, by procuring an acknowledgment from the latter, and passing the conveyance for the genuine deed of the one having title. But this difficulty is obviated by requiring the officer to certify that the cognizor is the person described in the conveyance, and that he knows, or has satisfactory evidence that he is the very person who executed it. The examination is *ex parte*. *Jackson v. Shepard*,(r) will be found a stronger case for the admissibility of the deed than the present one. The Judge there certified that James Roe was the grantor, yet the deed was holden to be properly overruled, because it wanted the clause required in the act of 1797. Where a deed is proved in open Court, with every opportunity for cross examination, the grantor must be identified. How much more need is there of strict accuracy in this respect, where the proof is entirely *ex parte*, and generally passes with the least possible inquiry and observation. But it is enough that this is matter of positive regulation. The statute declares the acknowledgment inoperative. The deed is like an English lease which wants a stamp. The absence of the proper mark renders it inadmissible.

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R. 478. 1 R.
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Talcott, (Attorney General,) contra. The second point now insisted on was not made at the trial. The objections were to the mortgage and affidavit, for the want of form only. As to the certificate of acknowledgment, the statute should receive a reasonable construction. The officer is not supposed to see the deed executed, nor can he, in gen-

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(r) *Jackson*
v. *Humphrey*,
1 John. Rep.
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(s) *Jackson*
v. *Schoonma-*
ker, 4 John.
Rep. 161.

(t) *M'Ferran*
v. *Powers*,
1 Serg. &
Rawle's Rep.
105, 106, per
Tilghman, C.
J. DeLancey's
Lessee v. M'-
Kean, 5
Cranch, 22.

(u) 1 Serg.
& Rawle Rep.
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(v) 5 Cranch,
29.

eral, do this. How is he to know the precise grantor, and be capable of certifying his identity, without any qualification, unless he sees the execution? The acknowledgment is the only evidence. The necessity of identification is imposed by the statute, not where the party himself acknowledges, but where the proof of the execution is made out by witnesses. The certificate is not conclusive.(r) Though it state the knowledge of the officer, this may be done away by adverse proof.(s)

The form of this certificate has been sanctioned by a most extensive and continual usage from the passage of the act to the present day, of which the Court will take notice.(t) If it is now to be condemned, hardly a title in the various recording counties of the state will be secure. In *M'Ferran v. Powers*,(u) it is said that the manner of taking the acknowledgment in question, had become "so extensive and deep rooted in practice, that numerous titles depend on it, and it would be unpardonable to disturb it now, by a critical examination of the words of the act," under which it was taken. In *M'Kean v. De Lancey's lessee*,(v) the question was as to the form of the exemplification to be used in evidence; and Lewis, counsel, named 27 cases in which he had been concerned, where exemplifications of the form in question had been used in evidence, and no objection ever taken. Marshall, Ch. J. said the Court would decide, if in doubt upon the law, whether they would hear evidence of the practice; and in delivering the opinion of the Court, he says, "were this act of 1715 now for the first time to be construed, the opinion of this Court would certainly be, that the deed was not regularly proved; but in construing the statutes of a state on which land titles depend, infinite mischief would ensue, should this Court observe a different rule from that which has been long established in this state; and what is decisive with the Court, is, that the Judge who presides in the Circuit Court for the district of Pennsylvania, reports to us, that this construction was universally received. On this evidence, the Court yields the construction which would be put on the words of the act, to that which the Courts of the

state have put upon it, and on which many titles may probably depend."

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[Here the Attorney General produced and offered as evidence of the usage under the recording act, a great many certificates from the Secretary of State, and the Clerks of different counties, showing that the certificate of acknowledgment in question corresponded with the form in very extensive use through the state, ever since the act of 1797.]

The words "to me known," (or, "to me well known,") used in this certificate, are of almost universal prevalence, without any thing more ; and if this is not right, the statute has been strangely misconstrued by almost every officer in the state. The statute of 1797 grew out of the frauds which had been perpetrated by personation, relative to the military tract ; and that the grantor is known to the acknowledging officer, is, in all cases, sufficient to avoid this consequence except perhaps in the single instance of there being two persons bearing the same name, and having the same description, which would be a strange, anomalous circumstance, not contemplated by the act. All that can be required is reasonable certainty, and this is attained by the form in question. That he knows the name of the grantor who confesses the execution, is all that can be required, in reason. The act does not prescribe any particular form, but is open as to the manner in which the knowledge of the officer is to be expressed. His knowing the person, implies every thing that is necessary. Some confidence must have been reposed in him by the statute. The witness must also be known. This is enough, without knowing him to have subscribed as a witness. The entire knowledge of the officer must, in the nature of things, be derived from the proof. This shows how unreasonable it must be to subject his acts to hypercritical scrutiny. The whole act should, if possible, be made consistent with all its parts. The words "to me known," refer to the cognizor as grantor. The officer says, "I know him as a grantor, in the deed upon which my certificate is endorsed." The language must be referred to the subject matter of it. Fraud may possibly happen, but it is not probable. It is enough that it generally meets the mischief it was intended to remedy. This act is highly penal,

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(w) 1 R. L.
371, 2, n. 9

giving treble damages to the party grieved, for the omission or fraud of the officer to bestow every necessary scrutiny upon the subject,(w) and if the question be doubtful, the Court should, for this reason, give a benign construction to his acts. Every law officer of the government has sanctioned this form.

2. It is objected that the certificate of the officer taking the affidavit of sale, does not state, in terms, that the deponent appeared before him, &c. But it is enough that the statute is substantially complied with. It appears that the deponent was sworn, and this could not well be unless he appeared before the officer. As to the description of the officer, this Court have repeatedly decided that the words "Commissioner, &c.," are sufficient to an affidavit in support of a motion. The reason in that case applies here. In both instances, it is necessary for the *jurat* to show that the officer has authority to administer an oath, or the deponent cannot be indicted for perjury.

3. As to the proof of insanity in D. Rose, it is conceded that its admissibility depends upon the question whether the mortgage was void or voidable. If the latter, it is enough for our purpose. "A thing may be said to be void in several degrees. 1. Void, so as if never done to all purposes, so as all persons may take advantage thereof. 2. Void to some purposes only. 3. So void by operation of law that he that will have the benefit of it may make it good."(x) Unless this mortgage be void, then, to all intents and purposes, the defendant, who is a stranger, cannot take advantage of Rose's lunacy. It is not enough that it is void to some purposes only. Blackstone(y) says, that "idiots and persons of non-sane memory, infants and persons under duress, are not totally disabled either to convey or purchase, but *sub modo* only. For their conveyances and purchases are voidable, but not actually void." It is said, the distinction in relation to a lunatic grows out of an exploded maxim. Not so. The deed is voidable, because a particular man cannot avoid it. The rule of non-stultification, if it exist, only goes to increase the strength of the position. But we are not driven to contend that the party may not avoid it. Could the king seize the lands of a lunatic on the ground that his grant is

(x) *Keite v. Clopton*, Vin. Ab. void and voidable, (A.) pl. 18.

(y) 2 Bl. Com. 291.

void, or must be await the execution of a commission or a *scire facias*? . Clearly the latter,(a) which of itself, shows that the conveyance is not a nullity. The very cases cited on the other side go to prove the same. It is said by Maddock,(b) that "after an inquisition found, the committee, it seems, may, in a suit by him and the lunatic, avoid his acts from the time he is found to be *non compos*;" and it would appear to follow that this could not be done before. In *Thompson v. Leach*,(c) the Court did say that the act of the lunatic was void, because, if only voidable, some act ought to be done to avoid it. They say, however, that the feoffment of a lunatic is only voidable; and they do not pronounce his deed, in any case, void to all intents and purposes; and they agree that the deed of a lunatic and infant are parallel in all respects, except that the former may not stultify himself. In *Zouch v. Parsons*,(d) the counsel relied on the distinction between those acts of the infant which take effect by livery or otherwise. As to this, Ld. Mansfield said,(e) "We think the law is as laid down by Perkins, (sect. 12,) 'that all such gifts, grants or deeds, made by infants, which do not take effect by delivery of his hand, are void: but all gifts, grants or deeds, made by infants, by matter in deed or in writing, which do take effect by delivery of his hand, are voidable, by himself, by his heirs, and by those who have his estate.' The words, '*which do take effect*,' are an essential part of the definition, and exclude letters of attorney, or deeds which delegate a mere power and convey no interest. In Bro. Abr. tit. '*Dum fuit infra ætatem*,' pl. 1, (which cites 46 Ed. 3, 34,) it is noted, 'that a *Dum fuit infra ætatem* was admitted to lie of a rent; and yet, by some, the grant of an infant was void—not voidable.' But (says the book) 'it is not so, for then this action would not lie, and besides, the delivery of a deed cannot be void, but only voidable.' There is no difference, in this respect, between a feoffment and deeds which convey an interest. The reason is the same." Lord Mansfield applies the same doctrine to a lunatic, and the same result follows. Suppose no bond, but only a mortgage is given for money borrowed of a lunatic, payable ten years hence; could the lunatic

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Lunatic, &c
(B. 2) (C. 3)
(E. 2.) *Be-
erly's case*, 4
Rep. 127.*Thompson v
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468.(b) 2. Mad
Ch. 592.(c) 1 Ld
Raym. 315.(d) 3 Burr
1794.

(e) Id 1804

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(f) Wood's
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(g) Pow. on
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(h) 3 Day's
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mortgages set it up as void, and sure immediately for the money lent? Certainly not; and, as Ld. Mansfield says in *Zouch v. Parsons*, the deed is not void unless both parties can avoid it. If either have a right to enforce, it is voidable merely. Some of the cases which I cite are those of feoffment. But the reason is the same in respect to a bargain and sale, or mortgage. An acknowledgment before an officer is an act as solemn as livery of seisin. An acknowledgment of a fine by a lunatic is not even voidable; and shall an acknowledgment before an officer be holden void? It is plain from Perkins, (sec. 298,) that an exchange by one of non-sane memory is voidable only, and may be made good by the entry of the heir; yet there is no livery upon an exchange. (f) Powell says, (g) "It is holden, that after office found upon the writs *de idiota inquirendo*, or *de lunatico inquirendo*, the alienation, gift, or other act, &c., of him who is *non compos mentis*, as well as of him who is an idiot, may be avoided even during his life, in a *scire facias* by the king, who is bound as *pater patriæ*, to protect all his subjects, their goods and estates." There is also a difference between an idiot, *a nativitate*, where the king is absolutely entitled to all his estate, subject only to maintenance, and a lunatic, where he is a mere trustee. In order to avoid incumbrances, it is held that the office shall relate back to the time when the disability arose. Then, without office these incumbrances cannot be avoided. Another distinction taken is, that incumbrances incurred before office found may be avoided by the king; those made after office are void, and in the case of *Webster v. Woodford*, (h) cited on the other side, the very first sentence pronounced by the Court is, that "It is not a question whether a deed executed by a person *non compos mentis* is voidable for want of capacity in the grantor to convey. All admit that it is." There was no pretence in that case that the deed was void; but it was holden that the lunatic might avoid it. There he sought to avoid his deed. Here he does no such thing. *Beverly's case* also decides that, before office, the acts of the lunatic are voidable; afterwards they are void. The same distinction will be found in Bacon's Abridgment, title Void & Voidable, (B) (C).

But admitting that a deed is to be considered void from the period at which the lunacy commences, our mortgage will not be overreached. The commission was executed the 17th Nov. 1818, and finds that Rose had been lunatic for 2 years only. The mortgage was dated February 29th, 1816, a period of 2 years and 8 months before the inquisition. No case, however, can be found, where one can take advantage of an inquisition unless connected in blood or estate with the lunatic.

4. Evidence of adverse possession was properly rejected, because no one can set up an adverse possession to avoid the grant of the state. This question did not arise, nor did the Court pretend to dispose of it, in *Jackson v. Hudson*,⁽ⁱ⁾ as supposed on the other side. It was put upon the nature of the possession. There was a patent from the state and various conveyances thence down to the lessor, while the Indian possession existed; and the objection of adverse possession applied to these intermediate grants. The Court go on to consider the law of adverse possession as it relates to individuals, and demonstrate that it was not, in that case, sufficient to avoid a private grant.

But the people cannot be disseised; nor, consequently, their grant avoided by adverse possession. The king cannot be disseised.^(j) This is said in so many words, in *Taylor v. Horde*.^(k) It is said, on the other side, that the statute avoiding the conveyance of lands held adversely is but an exposition of the common law. This is true except as to the penalty. If here was an adverse possession, what is to prevent the patentee being sued for the penalty? Neither at common law nor by the statute is the conveyance of the people avoided.

But the defendant could not set up an adverse possession, even as against an individual. Both parties derive title from the same source—the lessor under a title derived from Merritt; and the defendant under a Sheriff's sale upon a judgment against Merritt subsequent to the deed. Merritt would not be entitled to such a defence, and so of the defendant, who derives title from him, and stands in his place.^(l)

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⁽ⁱ⁾ 3 John.
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^(j) Vin. Ab.
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^(k) 1 Burr.
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^(l) *Jackson*
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Caines' Rep
444. *The same*
v. *Whitford*, 2
id. 215. *The*
same v. *Graham*, 3 id. 188
The same v.
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202. *The same*
v. *Vosburgh*, 7
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186. *The same*
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(m) Jackson
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(n) 2 John.
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If the patent be considered voidable, for this cause, it must be repealed by a *scire facias*.(m)

Davis, in reply. We do not object to the validity of the mortgage on any ground except lunacy. Its want of being properly acknowledged does not avoid it. Other proof might have been received of its execution. The acknowledgment being entirely *ex parte*, the officer should be holden to bring himself strictly within the statute. In *Jackson v. Shepard*,(n) the grantor appeared before the officer and made the acknowledgment ; yet because the statute was not precisely pursued by stating that he was known, the certificate was holden void. There is every reason for holding the officer strictly to his duty. We are strangers to the witnesses, and have no opportunity to impeach them. The great object, as I observed before, is identity. The certificate may be true, and yet the deed not signed by the grantor described in it. There is no penalty imposed for an imperfect certificate. The legislature required knowledge in the officer, and that this should be expressly certified. No matter how strong his obligation to act correctly, this knowledge cannot be implied, nor can it be made where it is certified thus generally and loosely, to apply to the grantor. The whole must be expressed. If the words, "to me known," were out, no one would pretend that the certificate could avail. All the old certificates, before the act of 1797, were in that form ; and to give effect to this certificate would make the statute a dead letter. It cannot reach the old mischief. It only proves that the officer knew the grantor to be of such a name. It is said that this should be received as *prima facie* evidence, at least. Why so? We have no power to attack it, because we are strangers to the whole proceeding. This is one reason why such great nicety is required. The whole is a matter of strict right, and should be so treated. No matter how many certificates may heretofore have been incorrect. A greater number will be found correct ; and the balance of custom would no doubt be found with us, if we could try the question by a general examination of the regis-

try officers. But if otherwise, the Court should not sanction an infraction of the statute.

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These remarks are also, in a great measure, applicable to the affidavit. The statute requires that the officer should certify the appearance of the deponent. May he depart from such a direction and leave this to be implied.

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As to the adverse possession, it is said that the case of *Jackson v. Hudson*, applies only to a possession in hostility to an individual ; but a recurrence to dates in that case shows that its effect upon the patent was fairly in question, and Kent, Ch. J. says, that "if the possession of the Indians was sufficient to destroy the deed from the individual of 1761, it would be equally effectual to destroy the grant from government of 1731. It is conceded that adverse possession avoided a deed at the common law ; and we need not, therefore, resort to the statute. The government have attempted to grant lands which, at the common law, they have no power to pass. I agree that the people cannot be disseised ; but the very cases to which we are referred on the other side show that they may be out of possession. If an alien purchase land, the king has a right to it, but he is out of possession, and the land may be holden adversely to him till office found. So of the people.(o) They cannot enter till office found, but when in possession, I admit they cannot be disseised ; the king cannot change or dispense with the common law,(p) and is, therefore subject to the rule which forbids any one to convey unless in possession. In all cases where an entry would be necessary for the subject, an office found is necessary for the king. This is the manner in which he is to enter, and as the same rules apply to his right of entry as to that of the subject, so his right of granting is circumscribed by the same restriction. Another case, showing the manner in which the king's right of entry is to be exercised, is that of *The Wardens & Commonalty of Saddlers*.(q) It was there held that where the king's tenant dies, when another is in possession at the time of the escheat, there the king shall not be adjudged in possession till the other's seisin and possession are removed.

(o) *Jackson v. Beach*, 1 John. Cas. 399. The same v. Lunn, 3 John. Cas. 109.

(p) Com. Dig. Prerogative, (D. 7.)

(q) 4 Rep. 58.

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Lunacy avoids the deed for all purposes. No matter, whether it was executed before or after the office found. The statute, (17 Ed. 2,) declares the king's right, which is, "that he shall provide that the lands of the lunatics shall be safely kept without waste," &c. The act of finding the inquisition does not make the deed void, but the lands never passed out of the lunatic by his grant, so as to be a moment beyond the reach of the crown. The office merely gives the custody to the king. The validity or invalidity of the lunatic's contracts are not determined by the inquisition, but is open for trial according to the ordinary course of the common law or Chancery. That this must be so, is plain from the circumstance that no office can be found after the lunatic's death, so that if he die the king can have no title, yet his deed shall be void. In Vin. Abr. (D) pl. 7, 8, it is said that all the acts of a lunatic *in pais* are void, except his feoffments and livery and seisin; and those are only voidable, because of the respect the law gives to a feoffment on the account of its solemnity in the transmutation of a freehold. (s) And in *Thompson v. Leach*, (t) the Court say, "The surrender of the lunatic was void, *ab initio*, and never had any effect in the law; and, therefore, any person may take advantage of it."

(r) *Beverly's case*, 4
Rep. 127.

(s) *Thompson v. Leach*.
Comb. 468 3
Salk. 300, 301.
S. C. 12 Mod.
172, S. C. &
P.

(t) *Carth.*
435, 436.

(u) 3 Burr.
1804.

It is said that *Zouch v. Parsons*, (u) overrules the distinction between an act accompanied with livery and seisin, and any other deed passing an interest, making each voidable only. It is true that something of this is said, but the ground of that case is altogether different, and the *dictum* is entirely *obiter*. The conveyance of the infant was mere matter of form, and might clearly be supported upon equitable grounds. He was heir, executor and residuary legatee, and released a mortgage of his testator on payment of the money. There is a farther difference between infants and lunatics than that made in *Thompson v. Leach*. Infants' contracts are sometimes void and sometimes valid. A contract for necessities is binding, but not so of a lunatic. The Court will find, by all the authorities, that except in cases of fine and feoffment, the acts of a lunatic are merely void. A fine is

in the face of the Court, and a feoffment is in the face of the country, which takes it out of the general rule.

The very definition of a contract is the agreement of persons capable of contracting, (v) or giving a rational assent to its terms. Mental alienation precludes the possibility of this.

In ejectment, the plaintiff must recover on the strength of his own title, not on the weakness of the defendant's ; (w) and it follows that if the mortgage is void, or there is any defect in the plaintiff's proof, judgment should be for the defendant.

It is said that the mortgage is not overreached by the inquisition in point of time ; but this is no objection to its admissibility. The inquisition is only *prima facie* evidence of the facts which it contains ; (x) and we might have gone on to show Rose a lunatic at a period much more than two years before the commission was executed. Of this act the jury on the trial of the cause are the proper judges.

Curia, per SAVAGE, Ch. Justice. The first question raised on the trial was as to the sufficiency of the certificate of acknowledgment on the mortgage executed by De Witt Rose. The Judge certifies that the grantor *was known to him*, but does not add that he knew him to be "*the person described in and who executed the deed.*" Were we called on to establish a form for such a certificate, I should certainly be for inserting that the grantor was known to the Judge, or other officer taking the acknowledgment, to be the person described in the deed ; but the legislature could not expect the officer to know that the grantor described in the deed actually executed it, otherwise than by his acknowledgment, or proof by a witness. The form used in this case has been in very general use, and the practice in this respect, may perhaps amount to a construction of the act. (y) At all events, I am unwilling to say that titles which depend for proof upon certificates thus drawn, are to be put in jeopardy by the allowance of such a technical objection ; for I cannot but consider the acknowledging officer drawing such a certificate as possessing all the knowledge required by the

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Jackson

v.
Gumaer.

(v) 1 Com
on Cont. 2.

(w) Rinn
on Ej. 15, 109
117

(x) 2 Madd.
Ch. 578. 1
Collinson, 396.

(y) M'Keay
v. De Lancy's
Lessee,
Cranch, 32.

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statute. The Judge, in my opinion, decided correctly, that the mortgage should be received in evidence.

The objection to the power of the commissioner to administer the oath and take the affidavit of the regularity of the proceedings, as well as to the form of his certificate, are both untenable.

As to the admissibility of the testimony offered to prove the lunacy of De Witt Rose, when he executed the mortgage, it is clear that the acts of a lunatic before office found are not void but voidable, and it is enough that the defendant does not stand in such a relation to the lunatic as entitles him to avail himself of the testimony.(z)

(x) *Beverly's*
case, 4 Rep.
123.

The evidence of adverse possession was also properly rejected. If such testimony would be proper as between individuals deriving title from the same person, (which it is not necessary to decide,) yet it was not admissible as against the people of the state. The reason which makes a deed void, because executed by a grantor out of possession, is, "for avoiding of maintenance, suppression of right, and stirring up of suits: and, therefore, nothing in action, entry, or re-entry, can be granted over; for so, under color thereof, pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed, which the common law forbiddeth, as men to grant before they be in possession." (Co. Litt. 214, a.) Our statute against champerty and maintenance is in affirmance of the common law, and superadds a forfeiture. The reason of the common law and of the statute cannot be applicable to the state, and therefore the rule fails. That such is the construction put upon a similar statute in the state of Connecticut, appears from the case of *Allen v. Hoyt*,(a) and *Barney v. Cutler*.(b)

(a) Kirby's
Rep. 221.

(b) 1 Root's
Rep. 489, 491,
per Cur.

On all the points raised, therefore, I am of opinion that the plaintiff is entitled to recover.(c)

New trial denied.

(c) In *Barney v. Cutler & Moulthrop*, (1 Root's Rep. 491,) the Superior Court of Connecticut, say, that "Guardians who give deeds of the

lands of their wards, pursuant to a decree of a Court of Chancery; executors, &c., who give deeds of the lands of the deceased by order of the Assembly or the Court of Probate; and collectors who sell lands for payment of taxes by order of law; and the treasurer who gives deeds of lands belonging to the state—cannot be said to be seised or disseised of the lands they undertake to convey. Those who do not act in their own right, or by virtue of any interest they have, but wholly by public authority, cannot be considered as being in any sense within the statute. Besides, most of them are under injunctions to convey in a limited time, which would render the performance of their duty impracticable, if it was necessary, in such cases, that possession should be recovered before a sale would be valid.”

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Feb. 1824.

Whitaker
v.
Young.

WHITAKER *against* YOUNG & YOUNG, impleaded with
YOUNG, heirs of YOUNG, deceased.

DECLARATION in assumpsit, upon the statute “for the relief of creditors against heirs and devisees,” (1 R. L. 316,) thus: “Albany, ss. Joseph Whitaker complains of Charlotte Young, Hannah Young, and Alexander Young, heirs of Benjamin Young, deceased, they the said Charlotte Young, Hannah Young, and Alexander Young, being the sisters and brother of the said Benjamin Young, deceased; *the said Charlotte Young and Hannah Young, being in custody, &c., and the Sheriff of the city and county of Albany, having returned to the writ of capias ad respondendum, issued to him in this cause, as to the said Alexander Young, that he was not found in his bailiwick; for that, whereas the said Benjamin Young, in his lifetime, to wit, on the 1st day of January, A. D. 1816, at the city of Albany, and in the county of Albany aforesaid, was indebted to the said Joseph Whitaker, in the sum of 1500 dollars, of good and lawful money of the United States of America, for so much money by the said Joseph Whitaker, before that time lent and advanced to the said Benjamin Young, in his lifetime, at his special instance and request; and being so indebted, he, the said Benjamin Young, in his lifetime, in*

Form of declaring against heirs, on the simple contract of the ancestor, under the act “for the relief of creditors against heirs and devisees.” (1 R. L. 316.)

The statute prescribing the mode of proceeding against joint debtors, where a part only are brought into court, (1 R. L. 521,) does not apply to an action against heirs, &c.

These are liable to the extent of their inheritance only.

If some are not warned those who are

must plead it in the first instance, or they lose the benefit of contribution.

But where it appears on the face of the declaration, that only a part of the heirs, &c., are arrested in the suit, those who are so arrested may demur.

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consideration thereof, afterwards, to wit on the day and year aforesaid, at the city of Albany, and in the county of Albany aforesaid, undertook, and then and there faithfully promised the said Joseph Whitaker, to pay him, the said Joseph Whitaker, the said sum of money above mentioned, when, he, the said Benjamin Young, should be, thereto, afterwards requested."

[The declaration also contained a like count for work and labor, goods sold and delivered, money had and received, money paid, laid out and expended, &c., &c., and concluded thus:]

Nevertheless the said Benjamin Young in his lifetime, and the said Charlotte Young, Hannah Young, and Alexander Young, as heirs of the said Benjamin Young, since the death of the said Benjamin Young, not regarding the said several promises and undertakings so as aforesaid made by the said Benjamin Young, in his lifetime, to the said Joseph Whitaker, but contriving, and craftily and fraudulently intending to deceive and defraud the said Joseph Whitaker, in this behalf, the said Benjamin Young, in his lifetime, did not, nor have the said Charlotte Young, Hannah Young, and Alexander Young, as heirs of the said Benjamin Young, since the death of the said Benjamin Young, paid to the said Joseph Whitaker the said several sums of money above mentioned, or any or either of them, or any part thereof, (although often requested so to do.) But the said Benjamin Young, in his lifetime, wholly neglected and refused so to do; and the said Charlotte Young, Hannah Young, and Alexander Young, as heirs of the said Benjamin Young, have hitherto wholly neglected and refused, and still do refuse so to do; to the damage of the said Joseph Whitaker, of 2000 dollars, and, therefore, he brings suit, &c.
General demurrer and joinder.

H. Louks, in support of the demurrer. The action is against the defendants, as heirs, and one is returned not taken. This appearing upon the face of the declaration, is the proper subject of a demurrer.(a)

(a) 1 Chit.
Pl. 29.
(b) 6 John.
Rep. 59.

In *Jackson v. Hoag*, (b) it was held that a judgment against heirs, when all were not taken, did not bind the inheritance

of those who were omitted. Heirs are not responsible *qua* joint partners personally, but *qua* inheritors, each to the extent of his inheritance. Take the case of two sons and three children of another son deceased; the two former take each one-third, and the three latter one-third, and their liability should be apportioned accordingly; but in case of partners, each is answerable for the whole debt, and if one only has property, this is liable for the whole.

Again; in case of heirs, each is liable to contribution; for each is answerable only so far as he has inherited; and the amount of his inheritance limits the extent of his responsibility. Hence it is, that heirs, &c., and tertenants, must all be warned by *scire facias*, on a judgment against the ancestor; (c) for those not warned, are not obliged to answer; but if some are not warned, and the others do not take advantage of this in the first instance, by plea, they lose the benefit of contribution, or of relief by an *audita querela*, in case execution issues against their land only. (d)

This is not an objection which can be obviated by amendment; for if the return of *non est factum* be stricken out of the declaration, as to one heir, still the others may plead that there is one heir who is not taken, which will be equally decisive against farther proceedings in the cause.

D. Hosford, contra. The words of the statute (e) regulating the proceedings against joint debtors, where all cannot be taken, are, "that all persons jointly indebted to any other person, upon any joint obligation, contract or matter whatsoever," may be pursued to judgment, in the mode we have taken here.

The heir is chargeable *jure suo*, as for his own debt, by virtue of the original contract, from having assets descended to him, and therefore, the declaration against him in debt is in the *debet et detinet*, although he may discharge himself by showing that he had no assets. (f) Hence the heir is considered the debtor to the creditor of the ancestor, until he discharges himself by showing that he has no assets. Where there are several heirs, the demand against them being joint, they are certainly joint debtors in the strictest sense of the

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Whitaker
v.
Young.

(c) 2 Saund.
9, n. (10.)

(d) *Michel*
v. *Croft*, Cro
Jac. 506. *Clerk*
v. *Hardwicke*,
Moor. 525
Eyres v. *Cow-*
ley, W. Jones,
319. *Sir W.*
Herbert's case,
3 Rep. 12, 13.

(e) 1 R. L.
521, n. 13

(f) 1 Esp.
N. P. pt. 2, p.
52, Gould's ed.
and the cases
there cited.

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Supplement,
&c.,

(g) 6 John
Rep. 59.

terms. That this is so, was clearly the opinion of this Court in *Jackson v. Hoag*, (g) cited on the other side.

The heirs who are taken, will sustain no greater inconvenience than other joint debtors, who are proceeded against in the same manner. The same remedy exists to compel contribution in both cases.

Curia. The defendants are answerable as heirs to the extent of their inheritance only ; and, as between each other, are liable to contribute on *scire facias*. If some are not warned, those who are must plead it, in the first instance, or they lose the benefit of contribution. (2 Saund. 9, n. 10, and the cases there cited.) This principle applies to the present case. As two only are taken, and it appears on the face of the declaration that three are liable, there is no need of the non-joinder being shown by plea. The defendant may demur. (1 Chit. Pl. 29, and the cases there cited.) The joint debtor act (1 R. L. 521, s. 13,) has no application to an action against heirs. There must, therefore, be judgment for the defendant, with leave to amend on payment of costs.

Judgment for the defendant.

Supplement to the note (a), ante, 432, 436, upon the question, ARE UNIVERSALISTS ADMISSIBLE WITNESSES ?

I REMARKED in the note to which this is a supplement, that in the Courts of Common Pleas and Nisi Prius, in several counties of this state, the question as to the admissibility of witnesses, who adhere to the creed of Universalism, has been frequently agitated. Some circumstances led me to suppose that this had oftener been the case in the 5th circuit, than in any other. Among these circumstances, was that of having seen the history of a public meeting in one of the counties of that circuit, in which the question was canvassed, as a matter which involved the rights of great numbers, and in which that respectable lawyer and philanthropist, Mr. F. C. White, was mentioned as having taken a leading part in the discussion. These considerations led me to request of the Hon. N. Williams, Judge of that circuit, an account of his views in relation to this question, if it had arisen and been decided by him ; and I am indebted to this able jurist for his notes of the following opinion, upon the question being presented in a

case before him, while on the 5th circuit. This did not come to hand till after my note had been printed; but I hasten to give it the earliest possible place in these reports.

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&c.

WILLIAMS, Circuit Judge, delivered the opinion of the Court. The point may be considered as open in this country, unless the opinion upon it given by the late learned Chief Justice, in the case of *Jackson v. Gridley*, (18 John. Rep. 103,) is considered as conclusive.

The rule, as adopted in that case, is this, "*That infidels who do not believe in a God, or if they do, do not think that he will either reward or punish them in the world to come, cannot be witnesses.*"

That an infidel who believes in a God, and also in rewards and punishments in a future state, may be a witness, is admitted in all the authorities, (except in Co. Litt. 6 b, which is certainly not law at this day,) and the question now is, simply, *Whether a man believing in a God, and in rewards and punishments in this world only, may be a witness.*

In the case of *Jackson v. Gridley*, the witness had declared, not only that he did not believe in a future state of rewards and punishments, but that when he died there was an end of him; that man was like the beasts, and that he knew of no being superior to man. Here, then, was a complete atheist; one who did not feel any responsibility to any superior being. Certainly, such a man could not be allowed as a witness; and the opinion delivered on the point in question, was not called for in that case. If the witness had believed in the Supreme Being, and in a responsibility to him for his actions, either in this, or a future state, the case would have been altogether different. But, in order to present the precise point in question, a witness must be offered who believes in a God, and in punishment by him in this life only. Ought a man with *such a creed*, in other respects competent, to be a witness? This is the question.

The cases reported in *Strange*, 1104, and *Leach*, 64, do not appear to me to touch this precise point at all. Neither do any of the opinions reported in the great case of *Omichund v. Barker*, except that of Chief Justice Willes. Unfortunately, his opinion is differently reported in *Atkyns'* and in *Willes' Reports*. And it would seem that the writers upon evidence, since that case was decided, have generally followed the report of *Atkyns*, which was published long before the publication of the opinion of Ch. J. Willes, from his own manuscript; and it is evident that *Atkyns* must have reported from his own notes of the opinions delivered in that case, because he has given that of Willes rather loosely, and materially variant from the one left by that learned Judge in his own handwriting.

As this opinion of Willes appears to have been relied upon by all the law writers upon the subject, as well as by the late Chief Justice in the case of *Jackson v. Gridley*, it becomes highly important to know what it was, as delivered, and preserved for future times by himself.

This opinion, as reported by *Atkyns*, (1 *Atk.* 45, and in ed. of 1781, p. 55,) was this: "And though I am of opinion that infidels who believe a God and future rewards and punishments in the other world, may be witnesses,

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Supplement,
&c.

yet I am clearly of opinion that if they do not believe a God, or future rewards and punishments, they ought not to be admitted as witnesses."

In the opinion, as reported in Willes' Reports, and which appears to be a serious, learned and elaborate one, the Chief Justice lays down (p. 545) this rule upon the point in question: "And, therefore, nothing but the belief of a God, and that he will reward and punish us according to our deserts, is necessary to qualify a man to take the oath." Again he says, (p. 548) "Infidels, (if any such there be) who either do not believe a God, or if they do, do not think that he will either reward or punish them in this world or in the next, cannot be witnesses," &c. And to make it clear, beyond a doubt, that he does not mean *future*, he says, by way of illustration, (pp. 550, 1.) "Supposing an infidel, who believes a God, and that he will reward and punish in *this world*, but does not believe a future state, be examined on his oath, (as I think he may,) and on the other side, to contradict him, a christian is examined, who believes a future state, and that he shall be punished in the next world as well as in this, if he does not swear to the truth, I think that the same credit ought not to be given to an infidel as to a christian, because he is plainly not under so strong an obligation."

From the foregoing, it is evident to me that Atkins has not discriminated nicely in reporting the opinion which has been so much relied upon; and it is not pretended that any of the opinions of the other Judges in the same case touch this point at all. And upon the whole, I cannot but yield my conviction, that according to the law as laid down by Ch. J. Willes, it is not necessary, in order to render a man a competent witness, that he should believe any thing more than that there is a Supreme Being, and that he will reward and punish, either in this or in a future life.

Jews, Mahomedans and Hindoos, have all been admitted as witnesses in England; and it would seem unchristian as well as unjust, so to extend the rule in this country, as to exclude those christians who believe in God, in a future state, and salvation through Jesus Christ, and in punishments in this world, though not in the next.

END OF FEBRUARY TERM.

CASES
ARGUED AND DETERMINED
IN THE
S U P R E M E C O U R T
OF THE
STATE OF NEW YORK,

**IN MAY TERM, 1824, IN THE FORTY-EIGHTH YEAR OF OUR
INDEPENDENCE.**

THE OVERSEERS OF THE POOR of the town of BROOKHAVEN *against* the OVERSEERS OF THE POOR of the town of SOUTHOLD.

THE people, &c., to J. S., N. P., and J. P. O., Esquires, three of the Judges in the Court of Common Pleas, and Justices of the Court of General Sessions of the Peace, in and for the county of Suffolk, Greeting: Whereas an appeal was lately brought and heard in our Court of General Sessions of the Peace, in and for the said county of Suffolk, held before you, from an order made by J. R. & B. W., Esqs., two of our Justices of the Peace in and for our said county, adjudging that the settlement of J. and P., his wife, and A. their daughter, was in the town of Southold, in the said county; and directing their removal from the town of Broekhaven, in the said county, to the said town of S., in which said appeal the Overseers of the Poor of the said town of S. were appellants, and the Overseers of the Poor of the said town of B. were respondents; and such proceedings have been had, in the said appeal, that a judgment or order has been pronounced and given in our said Court before

Certiorari to general sessions to remove proceedings, with evidence and points decided, and the judgment.

Sessions must comply with such a writ, and return the evidence, &c., tho' they may not have stated a case.

If they refuse, this court will compel them to do this by rule.

NEW YORK,
May, 1824.

Overseers of
Brookhaven
v.

Overseers of
Southold.

you, against the said respondents; and we being willing for certain reasons, that the record of the said proceedings and judgment should be certified by you to our Supreme Court of Judicature, do therefore command you, that you send, under your respective seals the record of the said proceedings and judgment or order, with the process, pleadings, evidence, objections made thereto on the hearing of the said appeal, and other things touching the same, to our Justices, &c., at, &c., on, &c., in as full and ample a manner as the same remain before you, together with this writ, that we may further cause to be done herein what of right ought to be done. Witness, &c.

Farlie, &c., Clks.

S. B. Strong, Attorney.

This writ was allowed by Mr. Recorder Riker, on an affidavit of Mr. Strong, counsel for the respondents in the Court of Sessions, detailing the commencement of the cause there, the evidence, points made, and the decisions thereon, with the order of the Sessions quashing the order of removal; and the Court below made a full return, embracing the particulars to which the affidavit related. The affidavit did not show that the Sessions had stated a special case, and for this cause,

D. Robert now moved to quash the certiorari and return. He said the practice of submitting to this Court questions of law, arising upon evidence given at the Sessions, depended on their stating a case voluntarily; but this Court will not compel them to do it. The Sessions are an inferior jurisdiction, proceeding summarily, as to which the general rule is that they are not bound to send up any matter upon certiorari, except their process and record of judgment. Such is the rule in England as to the Quarter Sessions; and the statute, (1 R. L. 285, s. 18,) requiring the Court of Sessions in the city of New York to state a case, upon certiorari, strongly implies that no other Court of Sessions is bound to do this.

To show when certiorari lies, and its nature and object, he cited 1 Ld. Raym. 469, 580; 1 Salk. 144; 2 Burr. 1042.

And to show when the proceedings of summary jurisdictions may be reviewed on the merits, he cited Burr. Sett. Cas. 64, 77, 278, 454; 3 John. Rep. 23; 1 T. R. 755; 2 Burr. 1040.

NEW YORK,
May, 1894.

Green
v.
Beekman.

But *the Court*, without hearing Mr. S. B. Strong, who was to have argued against the motion, said that the constant practice of this Court is, to require the Sessions to state the evidence and points of law in their return. And though this is denied in England, and rests upon the will of the Court below, as Mr. Robert had insisted; yet, in this state, if the Sessions should refuse to make such a return, this Court would compel them to do it, by a rule.(a)

Motion denied with costs.

SAVAGE, Ch. J. was absent.

(a) Mr. Strong informed me that he relied for his practice, in this case, entirely on what the Court say in *Sweet v. The Overseers of the Poor of the town of Clinton*, (3 John. Rep. 23, 26.)

GREEN and MATTHEWS *against* BEEKMAN and others,
owners unknown.

In partition. *Story* moved that moneys, paid into Court for the use of owners unknown, pursuant to the statute, (sess. 36, ch. 100, s. 7, 1 R. L. 511,) be paid over to two persons who claimed it. He produced proof that the proper notice of the motion had been given, and because the sum claimed by each was small, being but about \$225, and it appeared that the claimants were men of large fortunes, the Court did not require the security to refund which they are authorized by the statute to demand in their *discretion*.

In partition, money paid into court for use of owners unknown, paid out to claimants, without requiring security to refund, as provided by statute, (sess. 36, ch. 100, s. 7, 1 R. L. 511,) it appearing that the sum claimed was small, and the claimants wealthy.

Rule accordingly.

SAVAGE, Ch. J. was absent.

NEW YORK,
May, 1834.

Anonymous.

JACKSON against WAKEMAN and others.

Absence of counsel on professional business, not allowed as an excuse for not going to trial, pursuant to a stipulation.

Otherwise of sickness or other inevitable accident.

At the last term, the plaintiff had stipulated to try this cause at the then next Circuit Court in the city of New York ; and not having done so,

W. Stosson, now moved for judgment as in case of non-suit.

A. Burr, contra, asked leave to stipulate again, on the ground that the plaintiff's counsel being absent on professional business at Albany, when the Circuit was holden at New York, the cause could not, for that reason, be tried.

Curia. We never receive this as an excuse. The farthest we have gone, as to the non-attendance of counsel, is to allow the excuse, if their absence arise from sickness, or other inevitable cause.

Motion granted.(a)

SAVAGE, Ch. J. was absent.

(a) Cowen's Rep. 167, S. C.

ANONYMOUS.

That a demurrer must be signed by counsel, yet if it is not so signed, and the opposite attorney, on its being served, signs an admission that he has been served

DEMURRER. A copy of a demurrer to a declaration had been served on the plaintiff's attorney, which was not signed by counsel ; but the plaintiff's attorney signed an admission that he had been served with a copy of a demurrer, and a notice of the rule to join in demurrer. He afterwards went on and took a default for want of a plea, on the ground that the demurrer was not signed by counsel.

with a demurrer, &c., this is a waiver of the defect, and he cannot treat it as a nullity

P. W. Radcliff, moved to set this default aside.

NEW YORK,
May, 1824.

J. Hoyt, contra, said, the demurrer not being signed by counsel, was a nullity.

Anonymous.

Radcliff. It does not lie with the plaintiff's attorney to say this, after he has admitted the service of a demurrer. It is a waiver of the defect. The admission imports a perfect demurrer, and the defendant's attorney should not afterwards be entrapped by its being considered a nullity ;

And of this opinion was *the Court* ; and they
Granted the motion, with costs.

ANONYMOUS.

On error, brought from the Columbia Common Pleas, the judgment was affirmed in this Court, and *double costs* had been taxed, as well as *interest*,^(a) by way of damages, for delay of execution ; and now,

On affirm-
ance of judg-
ment upon a
writ of error,
the plaintiff is
entitled both to
double costs
and interest
by way of da-
mages for de-
lay of execu-
tion.
Interest tax-
ed with the
costs.

E. Williams moved for a re-taxation upon this ground, among others. He said the party was not entitled both to *double costs* and *damages*, for the delay. Double costs are the penalty, and if the party elect these, he waives the damages.

R. F. Wells, contra, said the statute (sess. 36, ch. 96, s. 13 and 14, 1 R. L. 346,) is explicit in giving both ; that, consequently, the election of one was not a waiver of the other ;

And of this opinion was *the Court*.

Motion denied.

(a) Vid. 2 Dunl. Pr. 1168 ; 5 Taunt. 656, 658 ; 6 id. 117, 346 ; 7 id. 14, 244 ; Tidd, 1219, 1220, 1221, and other cases cited in 2 Dunl. Pr. 1168, 1169, as to the cases in which interest is allowed, on affirming judgment below.

NEW YORK,
May, 1824.

Lawrence
v.
Dickenson.

LAWRENCE *against* DICKENSON.

Suit is removed from common pleas by habeas corpus, and the plaintiff neglects to declare within two terms, and the defendant afterwards refuses to receive a declaration; then the plaintiff brings a second action here for the same cause. The court will not stay proceedings in the last suit till the costs of the first are paid.

Where the defendant removes a cause by habeas corpus and the plaintiff does not follow him by declaring in this court, he is not bound to pay costs.

H. B. DAVIS, for the defendant, moved to stay proceedings until the costs of a former suit, for the same cause, were paid. The former suit was between the same parties, and commenced in the Court of Common Pleas, and removed by the defendant into this Court. Two terms having elapsed after he had put in special bail, the plaintiff then proceeded to declare, but the defendant's attorney refused to receive a declaration.

D. Russell, contra, could not conceive upon what ground the defendant expected to succeed in his application. Wherever proceedings are stayed till the costs of another suit are paid, the defendant should, at least, be entitled to receive, and the plaintiff bound to pay them. Here is nothing like vexation in the conduct of the plaintiff. He offered to proceed in the first suit, but the defendant prevented him by taking a ground strictly technical, and is no more entitled to receive the costs of the first suit either in law or justice, than if they had been already paid to him.

Davis admitted that the plaintiff would not have been liable to pay the costs; that is to say, the defendant could not have had execution. But having brought a second suit for the same cause, for this vexation, the Court will exercise their power of staying proceedings till the costs are paid. The defendant has no other remedy.

Curia. Here is nothing like vexation. The plaintiff offered to proceed with his first suit, but you prevented him by refusing to receive a declaration.

Motion denied, with costs.

NEW YORK,
May, 1824.Roosevelt
v.
Dale.ROOSEVELT *against* DALE, executrix of FULTON.

THIS cause being noticed for trial and inquest on the 15th March last, (for the New York circuit,) the attorney for the defendant, before the inquest was taken, made and filed with the Circuit Clerk an affidavit, stating that neither of the defendants were then in the city of New York, as he was informed on inquiry, and verily believed to be true; and that, as he had been informed by them, and verily believed, they had a good and substantial defence on the merits. The notice of trial and inquest, was served the 3d day of March last. The affidavit was entitled—" *Supreme Court. Charles Augustus Dale and Harriet, his wife, which said Harriet is the surviving executrix of the last will and testament of Robert Fulton, deceased, ads. Nicholas I. Roosevelt.*" But the action was brought against Mrs. Dale, alone, as executrix of Mr. Fulton, before her intermarriage with Charles Augustus Dale, which took place before the cause was noticed for trial.

The plaintiff in noticing the cause for trial, entitled it thus: "*Nicholas I. Roosevelt v. Harriet Fulton, (now Harriet Dale,) surviving executrix of Robert Fulton, deceased.*"

In the affidavits for this motion, the cause was entitled in both these ways, so that it appeared at the head of the affidavit as if there were two causes; under which the affidavits began in this manner: "*C. G. attorney for the defendants in the above cause,*" and they spoke of *the cause* in the singular number throughout; as *the said cause*, or *the above cause*.

In order to prevent the inquest, a copy of the affidavit for that purpose, had been served on the plaintiff's attorney, the day when it was filed, pursuant to the general rule of

Feme sole is sued, and marries pending the suit. This need not be noticed in the subsequent proceedings, but affidavits, notices, &c., should be according to the original title of the cause. If they treat the husband as a party they are defective; otherwise, if the marriage be mentioned in the title as mere description of the person of the *feme*.

Where an affidavit was entitled in two causes, one of which was rightly, and the other wrongly stated, and the affidavit proceeded to speak of *the cause*, in the singular; held, that this was sufficient.

An affidavit of merits to prevent an inquest within the rule of November term, 1808, if made by the attor-

ney, should contain a good excuse for its not being made by the defendant.

Though not technically a party, yet one who marries a *feme* defendant pending the action, is substantially a defendant, and may accordingly make an affidavit of merits.

NEW YORK,
May, 1824.

Roosevelt
v.
Dale.

November term, 1808, and an affidavit of C. H. Dale, with a double title as above, had also been served as one of the papers for this motion, in which Mr. Dale swore, "*that the defendants in the above cause have a good and substantial defence upon the merits in said cause as this deponent is advised by their counsel, and verily believes to be true;*" and that he left the city of New York, for his residence in Columbia county, on the 17th day of April last, and did not return to this city until the 28th day of the same month. The trial had been stayed by an injunction from Chancery till the 21st of April last.

An inquest having been taken in the cause, out of its order on the calendar, (on the 22d of April, to which time the March circuit had continued,) under the said rule of November term,

C. Graham, now moved that it be set aside for irregularity.

J. I. Roosevelt, Jun. and S. Jones, contra, objected that the affidavit to prevent the inquest was defective. 1. Because wrongly entitled. Dale is no party to the suit. Where a *feme* defendant marries, pending a suit, it does not change the proceedings. (a) She cannot by her own act create an abatement. No person, not named in the record, can be made a party without a *scire facias*. There being no such cause in Court, the affidavit was a nullity. The reason is, that it could not be made the basis of an indictment, if untrue. A *scire facias* is founded upon some matter of record, but there is no record until judgment; and since the late statute, (b) there is not even an issue roll. (c) How then could the husband have been made a party, even if the plaintiff had wished it?

2. Admitting the title to have been sufficient, the affidavit should have been made by one of the defendants. The excuse that they were not then in the city, was not a valid one. The notice of inquest had been served more than seven weeks, and the Court had been in session more than five weeks. Why was not their affidavit procured during that time? They might have made it in Columbia county, as

(a) *Dalgrey v. White*, Cro. Jac. 323. Bull. N. P. 22. 1 Jac. L. D. 2, Abatement, I, b. c. *Cooper v. Hunchin*, 4 East, 521. 1 Chit. Pl. 438. *King et al. v. Jones*, 2 Str. 811. *Id.* Raym. 1525. S. C. *Lofft*. 27. 2 Saund. Rep. 72, k.

(b) *Secs.* 41, ch. 259 & 4.

(c) And vid. *Croswell v. Byrnes*, 9 John. 287.

well as in New York. But even if their presence in New York was necessary, Dale admits that he did not leave this city until the 17th of April; more than a month after the opening of the Court.

NEW YORK,
May, 1894.

Roosevelt
v.
Dale

3. Neither of the titles of Mr. Dale's affidavit is correct. One is not, for the reasons already stated; the other is not because it does not conform to the record. "Now Harriet Dale," is a matter *in pais*, which cannot be judicially known. Besides, it is not stated that Charles Augustus Dale ever married Mrs. Fulton. This fact cannot be noticed by the Court *ex officio*.

4. Dale being no party to the suit, the affidavit should have been made by Mrs. Fulton, the real defendant.

Curia. The objection to the affidavits for the motion, is not well taken. The title, "Harriet Fulton, (now Harriet Dale," &c.), is substantially true. It is correct unless the addition of "*now Harriet Dale*," vitiates it. This purports to be, and is in fact, mere matter of description, and it may, with the other title of a cause which does not exist, be rejected as surplusage.

But the affidavit to prevent the inquest, was defective for two reasons. One is, that it contains no sufficient excuse for being made by the attorney, and not by Dale, or his wife. The affidavit of merits by an attorney, even to prevent an inquest, is not properly receivable, unless a reasonable excuse is furnished for omitting the defendant's affidavit.(a)

But this affidavit was not properly entitled. The authorities, cited by the counsel for the plaintiff, fully and clearly establish that where a *feme sole* marries pending the suit, this does not affect the form of the proceedings. No notice is taken of it, but the suit goes on as if no marriage had taken place.

(a) Vid. Phil-
lips v. Blaggs
3 John. Rep
141. Geib v
Icard, 11
John. 52.

The inquest is regular, therefore, and the only question is whether the subsequent affidavit is regular, so as to warrant setting aside this inquest on terms. In relation to this it is objected that Dale is not competent to make the affidavit, because he is not a party. And the promises are undoubtedly true. He is not technically a party, and, therefore, is

NEW YORK,
May, 1824.

Jackson
v.
Mather.

not treated as a party upon the record. But in other respects, and eminently so far as interest is concerned, he is a party with his wife. Whatever affects her, affects him equally. On recovering judgment against her he may be made an actual party by a *scire facias*, and in this manner, be subjected to execution. Being substantially a party, we think he is to be received to make an affidavit of merits, consistently with the rule which requires this to be done by *the party*. Let the inquest be set aside, on payment of costs.

Rule accordingly.

JACKSON *ex. dem.* M'CLELAN and others, *against* MATHER.

Unnecessary papers, copied *in hæc verba* into a case, tho' allowed by the judge on settling the case, were disallowed in taxation.

Only one draft of subpoena and subpoena ticket allowed, though several subpoenas issued.

Certified copies from the secretary's office taxed.

So certified copies of depositions taken *pendente lite*, under act to perpetuate the testimony of witnesses, &c. (1 R. L. 455.)

But there must be an affidavit that these were necessary, &c.

APPEAL from the taxation of costs in ejectment, and verdict for plaintiff, on which a case was made, and judgment thereon for the plaintiff. In making up the case, (which was done by the plaintiff,) several written evidences of title, as patents, deeds, and field books, were inserted therein *verbatim*; and on taxing the costs, the taxing officer refused to allow for copying these, as he deemed them not necessarily incorporated in the case, though they were allowed to be inserted by the Judge who tried the cause, by whom the case was settled.

He also refused to allow for more than one draft of *subpæna*, though several *subpænas* were issued; and so of tickets.

He also refused to allow the fees paid for certified copies of a patent, an act of partition, deed of partition and field book, and another deed which had been procured from the office of the Secretary of State—\$24 35.

He also refused to allow for copies of testimony taken under the "act to perpetuate the testimony of witnesses in certain cases," filed in the Delaware Clerk's office, and exemplified—\$9.

Curia. This case is swelled to 200 folios, by copying the patent, field book and deeds *in hæc verba*; when 30 folios

would have answered every purpose. It would have been enough to refer to these papers, without encumbering the case with the entire instruments. It was in season to object this on the taxation which is so far right.

One draft is sufficient for all the *subpœnas* in the cause, and so of the tickets. The taxation is right in this respect.

But the charge for certified copies should have been allowed. The certificate and seal of the Secretary is made evidence,^(a) and it is no longer necessary for him to attend Court on a *subpœna duces tecum*, or commit the papers of his office to a deputy, as formerly. The allowance comes in place of that which was formerly due to him as a witness, and is highly reasonable.

So also as to the papers for perpetuating testimony under the statute.^(b) The 4th section of that act, it is true, declares that the parties may take copies at their own expense, and would seem to imply that this should not be taxed; but as to evidence taken under that statute in a suit already pending, there is nothing to negative the allowance.

NEW YORK,
May, 1894.

Jackson
v.
Stiles.

^(a) Stat. sec.
32, ch. 141, s.
1.

^(b) Sess. 36,
ch. 61, 1 R.
L. 455; and
vid. *Jackson v.*
Hooker, 1
Cowen's Rep.
586.

RULE. That the costs in this cause be re-taxed; but the taxation is confirmed except as to \$24 35, for copies of records from the Secretary's office, and the sum of \$9, for copies of testimony perpetuated, and that, as to those items, the same be allowed, on filing an affidavit that the said copies were necessary on the trial, and that the plaintiff has paid for the same the amount charged.^(c)

^(c) See *Jackson v. Root*, (18 John. 336,) acc.

JACKSON, ex. dem. LOOMIS, against JOHN STILES, WHITE,
tenant.

H. B. DAVIS, moved for leave that the tenant enter into a special consent rule. He read an affidavit of the tenant thus: To entitle the tenant to enter into a special consent rule in an action of ejectment, as a tenant in common, he must, at least, swear that he claims as tenant in common.

That he believes the action will involve a question between tenants in common, is not enough.

NEW YORK,
May, 1894.

"that, as he, this deponent, verily believes, this ejectment will involve a question between tenants in common."

Fitcher
v.
Pierce.

SAVAGE, Ch. J. He should swear that he is a tenant in common.

Davis. It is a question of law, whether he is so or not. He can do no more than state his belief.

SAVAGE, Ch. J. He can take the advice of counsel. At least, he must swear that he *claims* as a tenant in common. That he believes the ejectment will involve a question between tenants in common is not enough.

J. A. Collier, opposed the motion. He cited *Jackson v. Lyons*, (18 John. 398.)

Motion denied.

ANONYMOUS.

Motion for a new trial for irregularity and newly discovered evidence, is an enumerated motion.

CURIA, per SAVAGE, Ch. J. Where a motion for a new trial is founded both upon irregularity and newly discovered evidence, it is an enumerated motion.(a)

And the counsel having moved the matter as a non-enumerated motion, the papers were returned without farther consideration.

(a) Vid. *Remsen v. Isaacs*, 1 Cairnes' Rep. 22; *Feder & Slater v. Sharp* 4 John. Rep. 183.

PITCHER against PIERCE.

tionari
le out
... .., but
returned by
the justice, amended without costs.

D. L. VANDERHEYDEN, moved to set aside a writ of certiorari, on the ground that it was returnable the 5th January

1824, which was out of term. The Justice had made a return.

NEW YORK,
May, 1824.

William M Manus & John Woodworth, jun. contra,
moved to amend.

Bogart
v.
Brinkerhoff

Curia. We grant the motion to amend, without costs.

HAZARD against HENRY, executor of POTTER.

THE First Judge of Ontario Common Pleas had, on the 13th April last, granted an order, absolute in the first instance, that the plaintiff's attorney furnish a bill of particulars in 20 days, and that all proceedings on the part of the plaintiff be stayed until such bill should be furnished. On the 15th April, *Wm. M. Oliver*, Esq. the plaintiff's attorney, requested the Judge to vacate this order, because it was absolute, which he declined doing; and now I moved to set it aside, because it should have been in the alternative, as was decided in the first volume of my reports, in *Brewster v. Sackett*, p. 571.

Order for bill of particulars absolute in the first instance. The judge is requested to vacate the order for that reason, which he refuses to do.

Order, therefore, set aside for irregularity.

J. L. Riker, contra.

Curia. Take your rule.

Motion granted.

BOGART against BRINKERHOFF.

SLANDER in the New York Common Pleas, removed by *habeas corpus*, returnable in May term, 1823. Special bail was put in on the 6th August last, and notice thereof given

The two terms within which a plaintiff is allowed to declare on

a *habeas corpus* must be reckoned inclusive of the term at which bail is put in.

Motion to set aside declaration served after that time; but because the plaintiff showed a good excuse for the delay, the motion was denied.

And so the plaintiff does not absolutely lose his right to declare, though two terms pass.

NEW YORK,
May, 1824.

Bogart
v.
Brinkorhoff

to the plaintiff's attorney, the next day. The plaintiff did not serve a declaration till in February term, 1824, so that two terms, including August term, (when bail was put in,) had elapsed since the defendant had put in bail. On the copy of declaration being left at the office of the defendant's attorney, he declined receiving it. On these facts,

C. S. Woodhull, moved to set aside the declaration, and that proceedings on the part of the plaintiff be perpetually stayed.

He insisted that the two terms after the return of the *habeas corpus*, within which the plaintiff was bound to declare, included the term at which bail is put in. (1 Dunl. Pr. 228. Sheridan's Pr. 487. Wyche's Pr. 290. 2 Archb. Pr. 173. 1 Tidd's Pr. 350. 2 Sell. Pr. 274. *Cheetham v. Lewis*, 3 Caines' Rep. 256. *Drake v. Hunt*, Col. Cas. 43. *Smith v. James*, 6 T. R. 752. *Hutton v. Stoubridge*, 1 Str. 631. *Clark v. Harbin*, Barnes' Notes, 90.) In *Bank of Orange v. Van Aukin*, (1 Cowen's Rep. 58,) bail was probably not put in before August term; and the only question there was as to the manner of service.

D. Brush, contra, contended that the term of putting in bail is to be excluded.

He also read an affidavit excusing the delay, stating that the reason why he did not declare within two terms inclusive was, that the late Judge Van Ness, who was counsel in the cause, had a paper material to enable him to declare; that the paper was with Judge Van Ness at his death. This fact, and supposing there was a perfect understanding between him and the defendant's attorney, and also supposing that the term of putting in bail was exclusive, induced him to delay declaring till the 13th March.

Curia. The term at which bail is put in must be reckoned inclusive; and the plaintiff was, in strictness, too late; but as a very satisfactory excuse is given for the delay, the motion must be denied, without costs.

Motion denied.

NEW YORK,
May, 1884.

Anonymous

Horton against Horton.

J. R. LAWRENCE, moved to set aside the verdict, and for a new trial, on the ground of the misconduct of the jury, who agreed upon their verdict while the Court were at dinner, and without the consent or knowledge of either party, dispersed and obtained their own dinners, and returned into Court at the opening thereof in the afternoon.

The separation of the jury after agreeing upon their verdict is not a cause for setting aside the verdict.

Aliter, if there is the slightest suspicion that their separation was abused, to the injury of the party.

J. A. Collier, contra, cited *Smith v. Thompson*, (1 Cowen's Rep. 221,) and note (a) there, where all the cases are collected. The result of these are, that though the dispersion of the jury may be a contempt of Court, for which the jury are punishable, yet it is not such an irregularity as will be a cause for setting aside the verdict.

The Court were of this opinion. They remarked that if the slightest suspicion had appeared, that the privilege which the jury had taken had been abused to the injury of the party, the verdict should be set aside, but none such was shown or even insinuated.

Motion denied.

ANONYMOUS.

An attorney having commenced an action without being retained for that purpose; and having failed in the suit, this Court made a rule upon him, that he should pay to the defendant his costs. These being duly taxed and demanded, but not paid;

This court cannot control the effect of an attachment, by ordering the defendant therein to be denied the jail liberties.

E. Williams, moved that an attachment issue against the attorney, and that he be denied the jail liberties, till the action which he had brought without being retained, was attached for not paying them and a rule made, that unless he paid them in ten days after notice of the rule, he should be suspended till he paid.

An attorney who was ordered to pay the costs of an

NEW YORK,
May, 1284.

Ex parte
Noble.

costs be paid, or that he pay the costs within a given time or be stricken from the roll.

Curia. The attachment must take its course. We cannot control its effect. But we order that the attorney pay these costs in ten days after notice of this rule, or that he be suspended from all practice as an attorney, till the costs be paid.

Rule accordingly.

Ex parte NOBLE.

Proceedings to obtain leave to prosecute the general sureties of a sheriff, under the statute, (1 R. L. 421, s. 6.)

In general, the affidavit should show a *fi. fa.* and return of *nulla bona*, &c., on the judgment against the sheriff; but this is not necessary, where it is shown clearly that he is insolvent.

J. C. MORRIS, moved for leave to prosecute the sureties of Jacob Downing, late Sheriff of Cattaragus county.

He read an affidavit (which was not entitled) setting forth,

1. A judgment of \$267 06, in October term, 1820, in favor of Noble against Reid & Dodge.

2. That a writ of *test. fi. fa.* issued and was delivered to Downing, then Sheriff of Cattaragus, January 11th, 1821, commanding him to levy the above sum, and endorsed for that sum, with interest from the 20th October, 1820, who levied the money accordingly.

3. That at last May term, Noble sued Downing for not returning the writ and paying over the money, and at the last February term, obtained judgment against him for \$292 78, which was docketed the 16th March last.

4. The affidavit, which was made by Noble, then proceeded thus: "And this deponent further saith, that the said Jacob Downing is, as this deponent is informed and verily believes, utterly insolvent, and destitute of property, has been confined on the jail limits of Cattaragus county, and is unable to pay any part of the said judgment so recovered by him, this deponent, as aforesaid; and that unless this deponent can collect the amount thereof of the sureties of the said Jacob Downing, upon their bond, the same will be lost. And this deponent farther saith, that the sureties who executed the bond required by law, with the said Jacob Dow-

ning, as such Sheriff as aforesaid, are, as this deponent is informed and believes, M. B. C., H. W., W. S., J. D., L. D., and H. D. F.

NEW YORK,
May, 1824.

Anonymous.

The motion was *ex parte*, and the only question was if a *fi. fa.* against the Sheriff and a return of *nulla bona*, &c., were necessary.

Curia. Before we give leave to prosecute the sureties of the Sheriff, under the discretion vested in us by the statute, (1 R. L. 421, s. 6,) we in general require that a *fi. fa.* against the Sheriff be returned *nulla bona*, &c., as the evidence of his inability to pay. But this is not necessary when it appears sufficiently plain, as it does in this case, that the Sheriff is unable to pay. Issuing a *fi. fa.* and having it returned would be an idle ceremony.

Motion granted.

ANONYMOUS.

THE plaintiff had taken judgment for the same debt, on the same bond, against the executors in one action and the heirs of the testator in another action, and

J. Smith, moved that there be but one taxation of costs. He claimed this under the statute, (1 R. L. 521, s. 14.) But,

The Court were clear, without hearing *Silliman*, who was to have argued on the other side, that the statute did not apply to this case. They said, it is confined to actions where the defendants may all be sued jointly, as in case of a joint and several bond—not where they must be sued severally, as here.

Tho' judgment be against executors and heirs in separate suits for the same debt, on the same bond, there will not be one taxation of costs under the statute, (1 R. L. 521, s. 14,) which applies only to cases where the defendants may be sued jointly

Motion denied with costs.

NEW YORK,
May, 1894.

Denslow

v.

Fowler.

DENSLow & Wife against FOWLER.

In trover for a bond, a motion to compel delivery of a copy, to enable the plaintiff to declare accurately, was denied.

TROVER for a bond. On an affidavit stating that the bond had been delivered to the defendant, demanded of him, and that he had refused to re-deliver it, and that a copy or description of the bond was necessary to enable the plaintiffs to declare;

J. Smith, moved that the defendant deliver to the plaintiffs' attorney a copy of the bond within ten days, or that an attachment issue against him. He cited 1 Tidd. Pr. 440, where it is said, that "the plaintiff may have a rule nisi, for the defendant to produce a deed before the commissioners of the stamp office, to be stamped, and also to give the plaintiff a copy of the deed, in order that he may declare thereon."

Silliman, contra, said this motion was unprecedented. Rules like the one applied for, had indeed been granted in actions arising *ex contractu*, but never in a case where the action is for a tort; and he referred to *May v. Gwynne*, (4 Barnwell & Alderson's Rep. 301,) where the same distinction was taken.

The Court were clear against the motion, and denied it, with costs.(a)

Motion denied.

(a) If one part only of an indenture be executed, the Court will compel the party having the custody of it, to produce it for their inspection, upon an action commenced against himself by the other party. *Blakey v. Porter*, 1 Taunt. 384. And the English Common Pleas compelled the production, by a defendant, of an unstamped agreement in his custody, to which the plaintiffs claimed to be parties in interest, upon the instance of the plaintiffs, in order that they might get it stamped, although the plaintiffs were not instrumentary parties, and their interest no otherwise appearing than by their own affidavit, which will prove a claim, but not an interest. *Semble*, that the Court would compel a plaintiff to produce deeds, by attachment. *Bateman et al. v. Philips*, 4 Taunt. 157. The Court will compel a defendant, in covenant on a deed which he holds, to produce it to the

plaintiff for the purposes of the cause; and it differs not that the plaintiff seeks for inspection, for the purpose of discovering some defect in the deed. *King v. King*, 4 Taunt. 666. The principle of these cases is stated by Gibbs, C. J. in *Street v. Brown*, 6 Taunt. 302. He says, that in both *Blakey v. Porter* and *King v. King*, "the ground on which the Court make the rule, is, that the party holding the deed was a trustee for the other." And where two parts of an indenture of charter-party were supposed to have been interchangeably executed, and the part of which the master of the chartered vessel had the custody, was lost at sea, with the ship, the Court would not compel the charterer, being sued thereon, to grant inspection, and a copy of the other part, for the purpose of the plaintiff's declaring with certainty. *Id.* And Gibbs, C. J. said he should be unwilling to establish a new precedent, though, if there were a case so decided he could not say that he should be unwilling to follow it. *Id.* And in an action for a libel, by *May* against *Gwynne*, 4 Barn. and Alders. 301, the Court refused to compel the plaintiff, who was vestry clerk of a parish of which the defendant was an inhabitant, to produce and permit copies of documents to be taken from the parish chest, in the custody of the plaintiff, though the alleged libel was a written report of the defendant, respecting the plaintiff's conduct, founded, as was stated, on these documents. Stress was here laid, however, on the action being for a libel, and Abbot, C. J. said, "If the papers had been wanted for the purpose of advancing any parochial right, the case would have been different." And in *Merriss v. Spenders*, 1 Brod. & Bing. 318, where the plaintiff made affidavit that he sued the defendant, to recover damages for a breach of agreement, in not entering into partnership, pursuant to a partnership deed, drawn up and signed by the plaintiff, but remaining in the custody of the defendant or his attorney, and that the plaintiff possessed neither copy nor counterpart of the deed, the Court granted a rule enabling the plaintiff to inspect the deed, and take a copy, though the defendant swore that he had not executed the deed; but the Court required that the affidavit should state, that the party moving had neither copy nor counterpart. In causes on policies of insurance, the Court will make an order, for the assured to produce to the insurers, upon affidavit, all papers or true copies thereof, relative to the matters in issue between the parties. *Lawrence v. The Ocean Ins. Co.*, 11 John. 245, n. (a). Where the action is not founded on any instrument of writing, but the declaration contains only the general counts on implied promises, the defendant is not entitled to an order on the plaintiff, to produce letters or writings in his possession, or to give the defendant copies of them. *Willis v. Bailey*, 19 John. 268. In the last case, the Court say, "We proceed on the principle, that, from the facts shown, the defendant would be entitled, on a bill of discovery, to the information sought for." When this bill will lie as to writings, see 1 Madd. Ch. Tit. Bills of Discovery, p. 166, and the cases there cited. In *Willis v. Bailey*, the Supreme Court decided that this motion to enforce a discovery, must be made to this Court; no order being grantable by a Judge at chambers.

NEW YORK,
May, 1834.

Denslow
v.
Fowler.

NEW YORK,
May, 1824.

Jackson
v.
Flint.

JACKSON, *ex dem.* WALKER, against ADOLPHUS W. FLINT

One claiming in opposition to the title of the tenant is not entitled to be admitted defendant in ejectment with the tenant.

Nor, *semb.* is he entitled to be admitted a co-defendant with the landlord of the tenant, though he claim as tenant in common with such landlord, who is willing and ing to im join-defend-

It was moved in this cause, that Alonzo Flint be admitted defendant, with his brother, A. W. Flint, the now defendant, and an affidavit of A. Flint was read, stating that this action was commenced against one Fowler, who was the tenant of A. W. Flint, who was, with the plaintiff's consent, substituted as defendant instead of Fowler. That when Fowler entered under A. W. Flint, A. Flint was a minor, but is now of age, and claims an interest as tenant in common, with the defendant, A. W. Flint, both being heirs of E. Flint, their late father, with whose widow, the mother of the defendant and the deponent, one Henry intermarried. The affidavit set up that Henry fraudulently conveyed the premises in question to one Packard, and took a mortgage of Packard, and Packard then conveyed to A. W. Flint, the defendant; that A. W. Flint, before he was of age, made partial payments on the mortgage, but, on coming of age, and on learning the fraud, refused to make any further payments; that Henry had no just right to the premises, but that the same belonged to the heirs at law of F. Flint, of whom the deponent is one; that Henry held, as guardian in *socage* of the heirs, so that in contemplation of law, they had never been out of possession; that A. W. Flint had requested the deponent to join him in defending the suit.

For the plaintiff, an affidavit was read, that the defendant, A. W. Flint, entered into possession under a title from Packard, in 1816, claiming title to the whole premises, and continued to claim thus till about two years ago, when he leased the whole to Fowler, and received the rent to his sole use, for several years in advance, and that A. Flint had never before the commencement of this suit claimed any title to the possession; that the lessor of the plaintiff is an assignee of the mortgage, for valuable consideration paid to Henry; and as such assignee, brings this action.

L. Beardsley, for the defendant and *A. Flint*, said the term *landlord*, in the statute, (1 R. L. 443, s. 30,) extends to every case, where the person applying claims to defend on a title connected and consistent with the title of the defendant in possession. (*Fairclaim v. Shamtitle*, Burr. 1290, 1294. Adams on Ejectment, ed. by Mr. P. Ruggles, 228, 230, 232, note (*d*), and the cases there cited. *Driver v. Lawrence*, W. Bl. Rep. 1259.) The only exception is where the person applying claims adversely to the tenant. (Id.)

NEW YORK,
May, 1894.

Jackson
v.
Flint.

J. D. Hammond, contra. At common law, even a landlord could not be admitted to defend an ejectment brought against his tenant, without the consent of the latter. (Adams on Ej. 226.) By the statute, landlords may be admitted to defend with, or instead of their tenants; and the utmost liberality of the Courts has never extended beyond the admission of landlords who claim title *consistent with the possession of the occupier*. (Adams on Ej. 231.) But where the person claims in opposition to the title of the tenant in possession, he can in no light be considered as landlord. (Id. 230.)

Now, Fowler, the tenant, claimed the whole of the premises, under a lease from A. W. Flint, who claimed the whole under a conveyance from Packard. The claim of Alonzo to part, as one of the heirs of his father, is clearly at war with the claim of Fowler to the whole; and, therefore, not within the rule.

Curia. The title set up by Alonzo Flint, and upon which he applies to be made co-defendant, is in plain hostility to that under which the defendant claims. The latter is a purchaser of Packard, who purchased of Henry and gave a mortgage, as assignee of which the lessor claims. The object of Alonzo is to defeat the title acquired under Packard. There is nothing like the relation of landlord and tenant between Alonzo and Fowler, or Alonzo and Adolphus.

Motion denied.

NEW YORK,
May, 1894.

Jackson
v.
Stiles.

JACKSON, *ex dem.* MARIA C. GOUVERNEUR AND OTHERS,
against STILES, TUCKER, tenant.

The court will not stay proceedings in ejectment, till the costs of a former ejectment are paid, unless it appear that the same title was, or might have been tried in the former suit.

And where W. brought ejectment against T. and G. sought to be admitted to defend as landlady of T. which was denied, because T. was the tenant of W; on G.'s bringing ejectment against T. *held*, that the proceedings should not be stayed in the second ejectment, till G. had paid the costs of the first

Miss GOUVERNEUR having been denied the right to defend as landlady of Tucker, who had attorned to, and taken a lease of her, after the expiration of his lease from one of the lessors in the cause reported ante, vol. 1, p. 575, as there mentioned, the plaintiff retained his judgment in that action, and had demanded the costs of Tucker, who refused to pay them. Miss Gouverneur having brought the present action, against Tucker, before he was turned out of possession in the first action,

J. Oakley, now moved that all proceedings be stayed on her part, till the costs of that action be paid. He said the general rule is, that the Court will stay all proceedings in a second ejectment until the costs of the first be paid, where the title in question is the same in both. The tenant may be insolvent. The landlady was denied the chance of defending in the first suit, on account of her own tortious act, (*Doe v. Smythe*, 4 M. & S. 347,) and a part of the costs in the former action, was occasioned by her application to be admitted defendant. Her unwarrantable interference, by inducing our tenant to attorn, drove us to the necessity of that action; and the only restraint which the Court can exercise against the multiplied actions of ejectment, conducted or defended in the names of others, is by staying the proceedings, till the injured party is made good for his costs. *Jackson v. Edwards*, (1 Cowen's Rep. 138,) was not so strong as the present; yet the Court stayed the proceedings, though Mr. Cady, the counsel for the plaintiff, urged the same objection, which may be taken here, that Miss G. is not legally liable to be proceeded against for these costs. In *Jackson v. Clark*, (1 Cowen's Rep. 140,) the motion was denied, it is true, but there the lessor in the second suit was no way privy to the first. 2 Archbold, 189, Dunlap, 1025, 6, and Adams,

320, show that it is not necessary that the merits should have been decided in the former action.

NEW YORK,
May, 1884.

Jackson
v.
Smythe

D. Tillotson, contra, denied the application of the authorities cited. They related to cases where the title had, or, at least, might have been decided ; but here the relation in which the former lessors stood to the tenant, and his attornment to the present lessor being void, Miss G.'s title could not possibly have been tried in the former suit, even if she had been admitted defendant. (*Doe v. Smythe*, 4 M. & S. 347.) On this ground, she was refused a chance to defend, on the plaintiff's own objection. (1 Cowen's Rep. 575.)

Curia. To warrant the rule as applied for, it should, at least, appear that the defence in the first suit was upon the same title, as the one sought to be enforced here by Miss Gouverneur, as lessor of the plaintiff. Now this could not have been so, for Miss Gouverneur claimed, in opposition to the title of the tenant in the former suit ; and she was denied a defence upon the very ground that her title could not be tried, as the former action was shaped. The relation of tenant and landlords, between Tucker and the former lessors, shut out all dispute about their title, or that of Miss Gouverneur ; and this too, upon an objection made by themselves. Here, then, has been no trial, or chance to try the title of the present lessors, either directly by themselves, or through any one in privity with them.

Motion denied.

NEW YORK,
May, 1824.

Jackson
v.
Eddy.

JACKSON, *ex dem.* WATSON, AND OTHERS, *against* EDDY
AND OTHERS.

Upon the ordinary rule for judgment as in case of nonsuit, *nisi*, the defendant must demand costs, &c, before he can have judgment.

But where the rule is absolute for judgment as in case of nonsuit, and is opened upon motion, on the payment of costs and stipulating, the plaintiff must tender the costs and stipulate, as a condition to having the effect of the rule.

A non-enumerated motion, tho' granted, may be opened of course, at any time during the progress of the non-enumerated business, the counsel on both sides being in court.

But if both are not present, *semb.* cause should be shown upon affidavit.

On the first day of the last term, the defendant's counsel moved for, and took a rule for judgment, as in case of nonsuit, (no one appearing for the plaintiff, to stipulate.) There had been no previous stipulation. On the 8th March, the counsel for the plaintiff read an affidavit, excusing the not appearing to stipulate upon the motion, and a rule was obtained, that the judgment, as in case of nonsuit, be set aside, on payment of all costs since the default in not bringing the cause to trial, and the costs of opposing that motion; and upon the further condition, that the plaintiff stipulate to bring his cause to trial at the next circuit in New York. On the 16th the costs were regularly taxed, on notice, at \$12 87. These not being tendered or paid, the final costs were taxed, and the judgment perfected on the 29th of March. On the same day, a stipulation and the costs were tendered to the attorney for the defendant, but he refused to receive them, alleging that judgment had been perfected. No demand of the costs had been made of the lessors of the plaintiff. Notice of the second motion had been given.

W. M. Price, moved to set aside the judgment, &c., for irregularity. He cited R. G. Oct. term, 1802; 1 Caines' Rep. 109, 154; id. 112; 3 id. 135; Caines' Pr. 515; 1 John. Cas. 30.

W. Slosson, contra.

Curia. The plaintiff moves on the ground that the costs should have been taxed and demanded, pursuant to the general rule of October term, 1802; and it is true, that had counsel appeared for the plaintiff, he would have been allowed to stipulate, of course. So, at any time during the term while the non-enumerated business was in progress, we should have opened the rule and given leave to stipulate; the counsel who moved originally, being in Court; and in

either case, the plaintiff would have been within the general rule, and might have waited a demand of the costs. But the latter would not have been done without the actual presence of both counsel ;(a) and for more abundant caution, it seems, an affidavit was made, showing cause why a stipulation was not given in the first instance, and notice of an application to set aside the judgment was given, which resulted in a rule strictly conditional, setting aside the judgment on the preliminary terms of paying costs and stipulating. The course which the business took, thus changed the ground ; and it became the duty of the plaintiff to fulfil the precedent conditions, before he could take the benefit of the rule. This he did not do. Instead of tendering a stipulation and costs presently, as was his duty, he lay by till the 29th of March ; and in the mean time the defendant had perfected his judgment. The tender was too late. This is not the ordinary rule *nisi*, whereon, it is well settled that the defendant must demand the costs. It is so much a matter of course in these cases to allow a stipulation, that we regret such strict practice being pressed ; but with this we have nothing to do. The defendant has been regular. He had a right, upon the terms of this rule, to go on, and we can relieve only upon terms. Let the judgment be set aside on payment of all the costs to this time.

NEW YORK,
May, 1824.

Jackson
v.
Eddy.

Rule accordingly.(b)

(a) Vid. 1 Dunl. Pr. 352. Ante, vol. 1, 197, acc.

(b) No step in the law is, perhaps, more frequent, than setting aside a regular proceeding upon certain conditions ; one of which is, almost invariably, the payment of costs. (Tidd, 457.) Sometimes, on pleading issuably, (Tidd, 508,) &c. sometimes, on putting in or justifying bail, (Tidd, 263, 1 John. Cas. 396,) &c. &c. But the exact time within which the party is to set about fulfilling the condition, has not been precisely ascertained by the decisions of this Court. They may, and generally do, on request, fix the time, but the rule is oftener general, *on payment of costs, &c.* omitting to state any period. In *Brooks v. Hunt*, (3 Caines' Rep. 94, 95,) "It was said by the bench, that in all cases the period within which costs are to be paid, is 20 days." But this follows a case in which the Court had denied a motion for judgment, as in case of nonsuit, upon payment of costs ; and must evidently be referred to the usual proceeding in such a case, which is, on stipulation, *sui generis* ; for the costs must first be demanded, and then after the lapse of 20 days, if not paid, the defendant takes judg-

NEW YORK,
May, 1834.

Jackson
v.
Baldy.

rest upon his previous rule. All this depends upon the general rule of October term, 1803, which regulates the practice without regard to the terms of the particular rule allowing the stipulation. (Vid. *Gilliland v. Morrell*, 1 Caines' Rep. 154; *Witmore v. Russell*, 3 Caines' Rep. 135.) That the language of the Court in *Brooks v. Hunt*, had this limited meaning, was lately held in *Broadstreet v. Phelps*, ante, 453, on motion for an attachment for non-payment of costs, ordered by a rule. Besides, if allowed where payment is a condition precedent, it would many times work positive injustice. I remember a case, several years ago, in which the plaintiff had taken a default, and had noticed the execution of a writ of inquiry, during the term at which the Court, on motion, ordered that the default and all subsequent proceedings be set aside, on payment of costs. This was a day or two before the writ of inquiry was to have been executed, and a delay of 20 days would have been a loss of the term to the plaintiff. Accordingly, Mr. C. Ruggles, who was counsel for the plaintiff, asked the Court what time the rule would allow the defendant, to fulfil the condition; and Thompson, C. J. said he must pay the costs *instantly*; i. e. within 24 hours, which is signified by the word *instantly*, according to the case of *Pryce v. Holsey*, B. 35, Geo. 3, cited in Tidd, 508, note (y). Mr. J. Sudam, I think, made that motion, on the usual affidavit of merits. None of the reported cases speak with so much precision as to time, but they all agree, as well as the books of practice, that the party must proceed with promptness to fulfil the condition, and if he do not, his adversary may go on with his case, entirely disregarding the rule. Mr. Dunlap, (in his Pr. 353,) speaking of a rule granted, on payment of costs, says, "It is the duty of the party obtaining the favor, to seek the opposite party, and pay or tender him the costs, *instantly*, without waiting until a bill is delivered, or the costs demanded." And he is fully borne out by the case which he cites of *Pugaley v. Van Allen*, (8 John. Rep. 352.) There a default was set aside on motion of the defendant, "upon payment of costs." This was in May term, 1811. Being taxed and demanded of the defendant, the 24th of June thereafter, but not paid, the plaintiff, more than a month after the demand, proceeded to execution, which it was moved to set aside.

Curia. The rule was conditional, and of no force, without the payment of costs. This is the import of the rule as entered, it being granted, "on payment of costs." The plaintiff must have been regular, and the defendant admitted to plead at the last term, as a favor, or the condition of paying costs, would not have been imposed. This being the case, it would not be reasonable that the favor should be obtained absolutely, and the plaintiff driven to the tedious process of recovering the costs by attachment. It may be doubted whether the rule would admit of the construction, that the party is in contempt for not paying the costs, as he was not ordered to pay them, but only admitted to a favor on that condition, and it was left to his volition, whether or not he would comply with that condition. If a new trial be granted on payment of costs, this rule, say the books, is conditional, and they must be forthwith paid. (Impey's K. B. 252.) So, when leave is given to a party to amend, it is on the like condition. (2 Crompt. 458.)

We have an analogous case in this Court. In *Jackson, ex dem. Onderdonk, v. Weston*, May term, 1893, the Court, according to an original note of the case, said, "that where a plaintiff is nonsuited, and comes for a favor, to set it aside, and it is set aside, on payment of costs, these costs must be paid *instantly*, and the party who is to pay, must go and seek the other party."

NEW YORK,
May, 1894

Jackson
v.
Edgely

Motion denied.

In *Cathcart v. Cannon*, manucaptor, &c. (1 John. Cas. 220; Col. Cas. 80, S. C.) the rule was, that the defendant be exonerated, on payment of costs, which not being paid, the plaintiff proceeded. *Curia*. The rule was *conditional*, and it was the duty of the defendant to have sought the plaintiff, and paid the costs to him, without waiting for a demand, or tender of a bill. He can only be relieved now, on paying *instantly*, &c. (*Stansbury v. Durell*, 1 John. Cas. 396. Col. Cas. 99, S. C. acc.) Tidd, 250, speaking of a like conditional rule, says, "It is incumbent on the defendant, (the party taking the rule) immediately to get an appointment thereon, from the master, to tax the costs, and to serve a copy of it upon the plaintiff's attorney; and when the costs are taxed, to pay the same without delay." (2 Archb. 189, S. P.)

Instantly: ["*Instantly* means within 24 hours. (*Pryor v. Hodgson*, L. 35, Geo. III." Tidd Pr. 508, note (y). An instant is not to be considered in law, as in logic, a point of time, and no parcel of time. By intendment of law, it may be divided and applied to several purposes. (Vid. Jac. L. R. Instant. Flowed 258, b. Co. Litt. 185, b. Vin. Abr. Instant. A. pl. 2. Show. 415.)

Connect the definition from Tidd, with the rule above laid down in *Pugsley v. Van Allen*, and you have the result to which G. J. Thompson came in the above anonymous case, viz. *That where a rule is granted on payment of costs, they must be paid or tendered within 24 hours*.

It may be doubted whether the rule would admit of the construction, that the party is in contempt for not paying the costs, &c. per Cur. in Pugsley v. Van Allen.

It is settled, both in the K. B. and C. P. of England, that it will not admit of this construction. Thus, of paying money into Court, if the rule or order be drawn up, that *upon payment of debt and costs* within a certain time, the proceedings be stayed; if the debt and costs be not paid within the time so limited, the plaintiff should proceed in the action; for the rule being conditional, he cannot thereupon obtain an attachment. (*Fricker v. Eastman*, 11 East, 319.) This goes upon the grammatical construction of the words, and as they are understood in practice. (Id.) And this was once so in the Common Pleas, though in the particular case of paying money into Court, the form of the rule was altered so as to give an attachment. (*Scorrall v. Mortet*, Barn. 263.) The K. B. denied the remedy by attachment upon the conditional rule of that Court, as long ago as the 18 Geo. 2, in *Hand v. Danelly*, (2 Str. 1220,) and such appears to have been the settled practice of that Court ever since. (*Stokes v. Woodeson*, 7 T. R. 6. 1 Camp. N. P. Rep. 558, 559, note.)

The same practice appears to embrace all cases where any thing is granted by the Court upon terms.

NEW YORK,
May, 1824.

Jackson
v.
Eddy.

Trin. T. 53 Geo. 3. *Dodsley v. Lady Hamilton*, 5 Taunt. 1.

Best, Serjt. had, in the last term, obtained a rule nisi, for setting aside an attachment which had issued against the Sheriff for not bringing in the body, and had made it absolute on payment of costs. *Vaughan*, Serjt. in this term, moved to discharge that rule, upon the ground that the defendant had never justified bail, nor taken any step, nor had paid the costs of the attachment.

Per Curiam. We have determined, that *where any thing is done upon terms*, the terms are in the nature of a condition precedent, and that the plaintiff may sign judgment without application to the Court. Since, therefore, the costs have not been paid to the plaintiff, the attachment stands, and he may pursue it. And they

Refused the rule

On the other hand, where a person is ordered by rule to pay costs, and they are demanded, as in *Bradstreet v. Phelps*, (ante, 453,) if the costs are not paid, the Court will, as in that case, grant a rule for an attachment against him absolute in the first instance. (Vid. 1 Dunl. Pr. 345, and the cases there cited. 2 Archb. Pr. 297, and the cases there cited.) Where the plaintiff's attorney demanded the costs of the defendant, without a letter of attorney authorizing him to do so, it was deemed sufficient; for the attorney was, in fact, entitled to the costs when received. (MS. T. 1820. 2 Archb. Pr. 297.) In this state, the attorney often appoints another to receive the costs. (Ante, 453. Dunl. 353, 4.) And in *The King v. C. D.*, (1 Chit. Rep. 723,) the rule was made absolute in the first instance, although four years had elapsed between the taxation and the motion, though the *allocatur* was compared to a judgment, and the attachment to an execution, and it was insisted that it was like a proceeding on a judgment after the year and day, where there must be a *scire facias*; and the Court made a difference in the two cases, and said that an execution might issue immediately, but an attachment must be preceded with actual notice, and might have been delayed by the party keeping out of the way

JACKSON, *ex dem.* EDEN, against RATHBONE.

Judgment for the plaintiff in ejectment affirmed on error,

and writ of inquiry to assess the plaintiff's damages intermediate judgment and affirmance: *held*, that the plaintiff is entitled to supreme court costs, for the writ of inquiry, &c., without regard to the amount recovered thereon.

Where a proceeding is in continuation of a suit carried to judgment, the costs of such proceeding follow, at the same rate with those allowed in the original suit.

Form of writ of inquiry on affirmance of judgment in ejectment upon error under the statute, (1 R. L. 343, s. 3.)

to the defendant the excess which it should be found he had paid to the plaintiff's attorney beyond what was legally due. The plaintiff's bill of costs had been paid, on demand, without taxation. This cause, which was ejectment, had been removed by the defendant to the Court for the trial of Impeachments and the correction of Errors, by a writ of error, and the judgment therein, which was for the plaintiff in this Court, had been affirmed; whereupon the plaintiff, on filing the *remittitur*, had proceeded to execute an alias writ of inquiry, (a) pursuant to the statute, (1 R. L. 143, s. 3,) to as-

NEW YORK,
May, 1824.

Jackson
v
Rathbone.

(a, The writ was thus: "The People, &c. to the Sheriff of the city and county of New York, Greeting; Whereas James Jackson, lately in our Supreme Court of Judicature, before our Justices thereof, at, &c. on the 1st Monday of January, A. D. 1823, by bill without our writ, and by the judgment of the same Court, recovered against John Rathbone the possession of his term then and yet to come, of and in 5 houses and lots of ground, 5 yards, &c. situate, &c. (*as in the first count of the declaration in ejectment*) which Medcef Eden theretofore, to wit, on the 1st day of May, &c. had demised, &c. to have and to hold, &c. (*as in that count,*) and also possession of his term then and yet to come, of and in other 5 houses, &c. (*pursuing the second count,*) and also, &c. (*going through with each count in the same manner,*) whereof the said John Rathbone is convicted, as appears to us of record: and whereas, also, afterwards, to wit, on the 17th day of December, A. D. 1823, in our Court for the trial of Impeachments and the correction of Errors, at the Capitol in the city of Albany, before the President of the Senate, the Senators and Chancellor, it was considered that the judgment aforesaid should be in all things affirmed; as by the record and proceedings thereof, in our Supreme Court of Judicature, before our Justices thereof; unto our said Court for the trial of Impeachments and the correction of Errors, by virtue of our writ of error, by the said John Rathbone of and upon the premises, before the President of the Senate, the Senators and Chancellor aforesaid, in the said Court for the trial of Impeachments and the correction of Errors, prosecuted, transmitted, and afterwards out of the same Court for the trial of Impeachments and the correction of Errors, unto our said Supreme Court of Judicature, before our Justices thereof, at the Capitol in the city of Albany, duly remitted, and there now of record remaining, more fully appears: and the said James Jackson, according to the form of the statute in such case made and provided, ought to recover his damages for the mesne profits of the tenements aforesaid, with the appurtenances, and for waste in the same committed, after the rendition of the judgment aforesaid; but because our Court, now here, doth not know to how much the issues and profits of the tenements aforesaid, with the appurtenances, from the day of the rendition of the judgment aforesaid, to wit, the said 1st Monday of Jan., A. D. 1823,

NEW YORK,
May, 1854.

Jackson

v.
Bathurst.

certain the damages of the plaintiff intermediate the judgment and affirmance; and the demand of the plaintiff was for the costs of this proceeding.

One question was, whether the plaintiff was entitled to Supreme Court costs, or only Common Pleas costs, without regard to the amount found by the inquisition, as whether it was under 50 dollars, or over 50 and under 250 dollars. And it was contended, that as the act under which the plaintiff proceeded gave him *costs of suit*, it meant Common Pleas costs only, which were regulated by the statute, (1 R. L. 344, s. 4,) and the decision in *The case of costs*, (17 John. 109.)

L. Mitchell, contra.

Curia. The writ of inquiry is a continuation of the proceedings in the first suit. The recovery in that suit carrying Supreme Court costs, it follows that they must be allowed in all the subsequent proceedings for the purpose of carrying it into effect. With this intimation, we refer the bill for taxation to Mr. Irving, the First Judge of the Common Pleas of this city and county.

Rule accordingly.

until the said day of the affirmance of the judgment aforesaid, do amount, and what damages the said James Jackson hath sustained by reason of any waste in the same tenements, with the appurtenances, after the day of the rendition of the said judgment committed—We command you, as before we have commanded you, that, by good and lawful men of your bailwick, you diligently inquire to how much the issues and profits of the tenements aforesaid, with the appurtenances, from the day of the rendition of the judgment aforesaid, unto the said day of the affirmance of the judgment aforesaid, do amount, according to the value of the same tenements, with the appurtenances; and also what damage the said James Jackson hath sustained by reason of any waste in the same tenements, with the appurtenances, from the said day of the rendition of the judgment aforesaid unto the said day of the affirmance of that judgment committed; and the inquisition which you shall thereon take, send to our Justices, &c. at, &c. on &c. under your seal, and the seals of those on whose oaths you shall take that inquisition, together with this writ. Witness JOHN SAVAGE, Ch. Justice, &c. at &c. on, &c.

NEW YORK,
May, 1824.Ex parte
Dean.*Ex parte* DEAN.

DEAN sued Armitage in a Justice's Court in Washington county, recovered judgment, and Armitage appealed to the Court of Common Pleas. The judgment before the Justice was rendered on the 12th. September last, and though the notice of appeal was given the same day, the bond to prosecute the appeal was not executed till the 16th of the same month. On the coming in of the Justice's return, at the last March term of that Court, Dean moved to quash the appeal, on the ground that the bond was not given in time. It was insisted that the computation of the time allowed for appealing by the statute, (sess. 41, ch. 94, s. 17, Laws, vol. 4, 82, c.) must be computed inclusive of the day of giving the judgment; but the Common Pleas being equally divided on this question, the motion was denied.

Where the computation of time in a statute is to be from an act done, the first day should be excluded.

E. g. under the statute, (sess. 41, ch. 94, s. 17,) prescribing the time within which an appeal should be brought from a justice's court

This Court were now moved for a mandamus, to compel the Common Pleas of Washington to quash the appeal, upon the ground taken in the Court below; and it was insisted here, that when the computation of time is to be made from an act done, the day on which the act is done is to be included in the reckoning; that this is fully supported by the decisions in the English Courts in analogous cases; (*Rex v. Aderly*, Doug. 463; *Castle v. Burdett*, 3 T. R. 623; *Glassington et al. v. Rawlins et al.*, 3 East, 407;) that the day on which the judgment was rendered is, in this case, the day on which the act is done, and is to be included; consequently, the appeal to have been within the 4 days, should have been on the 15th. The practice of reckoning one day inclusive and the other exclusive obtains only in the construction of rules of Court, and is the same here as in England. The construction, in such case, is determined by rule of Court, and has no influence in giving an interpretation to a statute. But,

Per Curiam. We have departed from the rule of construction adopted by the English Courts, and hold that the same mode of computation is to be adopted upon statutes

NEW YORK,
May, 1824.

Ex parte
Dean.

which prevails both in England and in this state as to notices; that is to say, one day is to be counted inclusive and the other exclusive. We held this at the last term upon the statute, (sess. 43, ch. 184, s. 3,) in relation to the sale and redemption of lands upon execution, which gives to the judgment creditor fifteen months from the sale within which he may redeem. Where the sale was on the 15th of August, 1822, we gave the creditor the whole of the 15th November, 1823, to redeem.

But without resorting to this rule of construction, we think the particular words of the statute under consideration show an intention in the legislature to exclude the first day. These are, that the party appealing shall at the time of rendering such judgment, or within four days thereafter, (that is, after the time of rendering judgment, which is, legally, the day of rendering it, and thus the day is excluded,) serve the Justice personally with a notice in writing, &c. (Sess. 41, ch. 84, s. 17.) To exclude the first day would, moreover, we believe, accord with the uniform practice under this statute.

Motion denied.(a)

(a) It is somewhat surprising, that in England, after a lapse of centuries, during which this question upon the computation of time from *ex act done*, has been so often passed upon, it should be considered still open, and indeed of a nature so much at large as to be incapable of submission to a general rule. Yet such is the result, according to the Master of the Rolls, of the last and almost the only English case in which the authorities upon this head are fully reviewed; though I think it is not difficult to perceive, from this case, that if the English Courts ever reach a general rule, it will accord with that adopted by the Supreme Court, in the matter of *Snyder v. Warren*, Sheriff of Rensselaer, (Ante, 518,) and the present case, *Ex parte Dean*. The English case to which I allude is *Lester v. Garland*, (15 Ves. 248,) determined by Sir William Grant, Master of the Rolls. That case was as follows:

Bequest of residue, in trust, in case A. shall, within six months after the testator's decease, give security not to marry

SIR JOHN LESTER, by his will, dated the 25th of December, 1804, after several dispositions, gave and bequeathed all the residue of his personal estate to trustees, upon trust, that in case his sister, Sarah Linter, shall not intermarry with A. before all or any of the shares hereinafter given to her children shall become payable, and in case his sister shall, within six calendar months after his decease, give such security as his trustees or the survivor, &c. shall approve of, that she will not at any time intermarry

with A. or, in case she shall so intermarry with him after the periods when all or any of the shares hereinafter bequeathed to her children shall become payable and shall be paid to him, her, or them, that she will, within six calendar months after such marriage, pay the amount of such share or shares, or cause any child or children who shall have received his, her, or their share or shares, to refund the same to the trustees, then, and not otherwise, the trustees were directed to pay such residuary estate to the eight children of Sarah Pointer, at the age of twenty-one, or marriage, with benefit of survivorship; with a proviso, that in case his said sister shall intermarry with A. before all or any of the shares of her said children shall become payable, as aforesaid, or shall refuse or neglect to give such security as aforesaid, then, and in either of the said cases, he directed the sum of 1000*l.* a piece only, with interest from his death or failure of his issue, as aforesaid, to be paid to the children of his sister; and, subject thereto, gave his residuary estate to the children of his other sister, Amey Garland.

The testator died upon the 12th of January, 1805, between the hours of eight and nine in the evening. On the 12th of June, the trustees gave to Mrs. Pointer notice, to give the security required by the will, on or before the 12th of July. Mrs. Pointer, on the 19th of June, gave a written notice to the trustees, that she would give no security; but on the 9th of July she gave another notice in writing, desiring to know the nature and extent of the security required, declaring that she was then willing to give them her bond, which was the only security she had to offer. In consequence of that communication, on the 11th of July, the solicitor for the trustees called upon her for the purpose of agreeing on the terms of the bond, when she requested further time; but afterwards, by a written notice, dated on that day, she refused to execute. On the next day, however, the 12th of July, upon the remonstrances of the solicitor for the trustees, she did execute the bond about seven o'clock in the evening. On the same evening, two of the trustees declared their approbation of the security, but the approbation of the third, being at Bristol, could not be obtained until some time afterwards; Mrs. Pointer having executed the bond at her residence in the neighborhood of Poole.

The bill was filed by the infant children of Amey Garland, claiming under the forfeiture, upon the ground, first, that after the notices given by Mrs. Pointer, upon the 19th of June and the 11th of July, she could not retract; secondly, that the security was not executed within the time.

Mr. Richards, Mr. Alexander, and Mr. Daniell, for the plaintiffs. There is no doubt, that this is a condition precedent. First, Mrs. Pointer was concluded by the express refusal to give the security required; if, as the defendants insist, she should retract that refusal. Secondly, the security she has given by the bond, dated the 12th of July, was not given within the time; the period of six months expiring with the 11th; the day on which the testator died being included in the computation, according to the case of *Castle v. Burditt*, (3 T. R. 623,) and many other authorities; the whole day, in these cases, being either inclusive or exclusive, without regard to the hour at which the act is done, or the event happens. The old cases

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B. then, and not otherwise, to pay to the children of A. with a proviso to go over, if she shall refuse or neglect to give such security.

A condition precedent.

The 6 months are exclusive of the day of the testator's death; therefore, as he died on the 12th of January, between eight and nine in the evening, a security given on the 12th of July, about nine in the evening, was held sufficient.

No general rule in computing time from an act or an event, that the day is to be inclusive or exclusive; depending on the reason of the thing, according to the circumstances.

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upon this point, collected in Viner, (20 Vin. Ab. tit. Time,) are contradictory; but the late decisions, *The King v. Adderley*, (Doug. 462, ed. 2,) down to *Castle v. Burditt*, following *Clayton's case*, (5 Rep. 1,) *Bellasis v. Hester*, (1 Ld. Raym. 280,) and older cases, are uniform, that where the computation is to be from an act done, the day is inclusive. In the case of *Pugh v. The Duke of Leeds*, (Cowp. 714,) it was considered a question of intention; and this is a mere question of construction upon this will, under which both parties claim as volunteers.

Mr. Thompson and Mr. Roupell, for the defendants, the children of Mrs. Pointer.—Sir Samuel Remilly, Serjeant Palmer and Mr. Newbalt, for the trustees. Admitting that this is a condition precedent, the plaintiffs must establish that the day of the testator's death is necessarily included in the computation. No alteration has taken place in the law upon this subject. It is true, for some purposes, the day may be taken to be either inclusive or exclusive, of which there are instances both ancient and modern; as, to prevent the penal consequences in an action against the Hundred, in which a robbery has been committed, the day is taken inclusive, according to the strictest construction; (*Norris v. The Hundred of Goutris*, Hob. 139; 1 Brownl. 156; 2 Roll. Ab. 520, p. 8;) and upon the same principle, from the penal consequence, the party prevailed in *The King v. Adderley*, (Doug. 462, ed. 2.) But in all cases, at which the Court looks with favor, the opposite construction is made, with the view to give validity to the transaction, as in the case of enrolment under acts of parliament, the day is always exclusive, as more favorable to the party, by giving validity to the transaction. A similar distinction is taken by Mr. Powell, (Powell on Mortgages, 532,) as the result of the authorities, that where the act is to confer an interest, or to give an enlarged or more beneficial enjoyment, the day is to be taken either inclusive or exclusive; and, upon the same principle, in *Pugh v. The Duke of Leeds*, the Court of King's Bench held, that to effectuate the intention, or to promote and uphold the spirit and meaning of an act of parliament, the words "from the date," or "from the day," should be construed either inclusive or exclusive, which was followed in *Ex parte Fallon*, (5 T. R. 283,) where Lord Kenyon puts the case of an instrument to be enrolled within one day after execution, which could not be taken to mean the fragment of the day of execution. The case in *Dyer*, (Dy. 218,) is, though strong, conformable to what is stated in the Second Institute. (2 Inst. 674.) The period of six months, in the case of lapse to the Ordinary, is exclusive of the day of avoidance, (2 Bl. Com. 276,) and upon the statute of Edward 1, (stat. 7 Edw. 1,) as to alienation in mortmain, the year is exclusive of the day. In all the cases, where the computation has been from an act done, including the day, the act has been one to which the party against whom the time was to run was privy; an act either by him or to him; and, in the case in *Hobart*, stress was laid upon the circumstance, that he might immediately bring his action. It is now settled, (Bayley on Bills of Exchange, &c. 37,) that the day on which a bill of exchange is presented, is exclusive, though the contrary

opinion formerly prevailed; and in pleading Oyer the two days are exclusive of the day on which it is demanded. (*Page v. Divine*, 2 T. R. 40.)

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This is in the nature of a forfeiture, and a forfeiture of the most odious description. The testator had two objects; to give the residue of his personal estate to the children of Mrs. Pointer, and to prevent her marriage with a particular person, and the penalty imposed upon her to secure the latter object is the loss of her children's fortune. The intention cannot be considered indifferent between these parties. These children were clearly the first object; and it cannot be supposed, that he would have given up that object, because the security was taken upon the 12th of July, instead of the 11th; or that he contemplated this subtle distinction, which is inconsistent with the vulgar acceptance of the words. The general principle being against the fraction of a day, the computation most material and most likely to fall in with the general transactions of mankind, is to begin from the last moment of the day rather than from the first. If the direction had been to do an act within one day after the testator's death, could the day on which he died be possibly considered as that day on which the act must be done? If this testator had died at the hour of eleven at night, could the remaining hour be accounted a day, consistently with the declared intention to allow the full period of six calendar months?

Mr. *Richards*, in reply. In the case of enrolment, the interest passes by the execution of the instrument; and then every possible construction is made to prevent divesting the right vested in a purchaser. In the case of the bill of exchange, the exception of that instrument depends upon the law of merchants. This is a mere question of intention: both parties entitled equally to favor. The fraction of a day is never allowed in the computation of time; and as, under these words, the remainder of the day of his decease cannot be excluded, there is no other course than to include the whole of that day.

The Master of the Rolls. The question in this cause is, whether Mrs. Pointer, within six calendar months after the decease of her brother, gave the security required by his will, as the condition upon which her children should take the benefit of his residuary estate. He died upon the 12th of January, 1805, at a quarter before nine o'clock in the evening. The security required was executed upon the 12th of July following, about seven in the evening. Computing the time *de momento in momentum*, six calendar months had not elapsed; but it is admitted, that this is not the way in which the computation is legally to be made. The question is, whether the day of Sir John Lester's death is to be included in the six months, or to be excluded; If the day is included, she did not; if it is excluded she did, give the required security before the end of the last day of the six months; and, therefore, did sufficiently comply with the condition.

It is said for the plaintiffs, that upon this subject a general rule has been by decision established, that where the time is to run from the doing of an act, (and, for the purpose of this question, it must extend to the happening of an event,) the day is always to be included. Whatever *Sista*

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In the time from the presentment of a bill of exchange, the day of presentment exclusive.

Other instances, where the day of an act done, or an event happening, is sometimes inclusive, sometimes exclusive.

there may be to that effect, it is clear the actual decisions cannot be brought under any such general rule. The presentment of a bill of exchange to the sight of the drawee, is an act done; and yet it is now settled, that the day upon which it is presented is to be excluded; though it had been ruled otherwise by three Judges of the Court of Common Pleas, against the opinion of Treby, Ch. Justice. But the law is now clearly settled against that decision. The annuity act, (stat. 17, Geo. 3, c. 26,) provides, that the twenty days shall run from the execution of the deed. The execution of the deed is undoubtedly an act done; yet, according to the decisions, the day upon which the deed was executed is excluded. So, in a case in the House of Lords, in 1796, in which I was counsel, *Mercer v. Ogilvie*, where the question was, whether, within the meaning of the act of parliament in Scotland, (1696, c. 4,) "for regulating deeds done on death-bed," a man had lived sixty days after *the making and granting of the deed*, it was held that the day on which the deed was *made and granted* was to be excluded.

In the cases of alienation in mortmain, the alienation is an act done; and yet, according to a case in Brooke, the day is excluded in the computation of the year, which the immediate lord has to enter for the forfeiture. Mr. Justice Blackstone lays down, that the day of the avoidance of a living, which must be by an act done, or an event happening, is excluded in the computation of the six months which the patron has to present. I do not, however, find that position in the Second Institute, to which the learned Judge, in his Commentaries, refers.

The cases chiefly relied on upon the other side, are, *The King v. Addeley*, (Doug. 463, ed. 2,) where the day on which the Sheriff's office expired was held to be included in the six months, after which he is not to be called on to return process. The Court of King's Bench first thought the day excluded, but chiefly upon the ground that the act, (stat. 20, Geo. 2, c. 37, s. 2,) was made for the ease of Sheriffs, and ought to be construed favorably for them, afterwards determined that it was to be included: the case of *Castle v. Burditt*, (3 T. R. 623,) where the day on which the notice was given was included in the month that was to elapse before the action could be brought: the case of *Glassington v. Rawlins*, (3 East, 407,) where, contrary to the first opinion of Mr. Justice Lawrence, it was determined, that in the computation of two months, creating an act of bankruptcy, the day of the arrest is to be included: lastly, the cases upon the statute of *larceny*, in which the day of the robbery is included in the year in which the party robbed has to bring his action against the Hundred, to which might have been added the case of continual claim. To prevent a descent from barring an entry, the claim must be renewed within a year and a day. Lord Coke says, the year and day shall be so accounted, as the day whereon the claim was made shall be accounted one. (Co. Litt. 255, a.)

Upon these cases, Mr. Serjeant Palmer made an observation that applies correctly to all of them, except the first; viz. that the act done, from which the computation is made inclusive of the day, is an act to which the party against whom the time runs is privy; and, as he has unquestionably the benefit of some portion of the day, there is the less hardship in constructively reckoning the whole of it as a part of the time allowed him; where-

as, in this case, the event was one totally foreign to the party, whose time for deliberation was to begin to run from that event. Mrs. Pointer could not reasonably be supposed to have any opportunity of beginning, on the day of Sir John Lester's death, the deliberation which was to govern the election ultimately to be made. In the case of a notice of an action to be brought, the party necessarily knows the time at which he is served with the notice, and may immediately begin to consider of the propriety of preventing the action by tendering amends. So a person arrested may immediately set about endeavoring to procure bail; and the same observation applies to the cases of the man robbed, and of continual claim. But one is not necessarily conscious of the death, still less of the contents of the will of another. Here, though it is impossible, consistently with the words of the will, to postpone the commencement of the time until the period of actual notice, yet it is not reasonable to include a day, useless to Mrs. Pointer for the purpose of deliberation, unless there is some clear, imperative rule, making it absolutely necessary. She had a very important choice to make: one way debarring herself of her natural right of marrying whom she pleased; the other, excluding her children from a considerable fortune. That is not a case for narrowing the time allowed for the decision.

It is not necessary to lay down any general rule upon this subject; but, upon technical reasoning, I rather think it would be more easy to maintain, that the day of an act done, or an event happening, ought in all cases to be excluded, than that it should in all cases be included. Our law rejects fractions of a day more generally (see the note (h) 14 Ves. 554, where it is admitted in bankruptcy) than the civil law does. The effect is to render the day a sort of indivisible point, so that any act done in the compass of it is no more referable to any one than to any other portion of it; but the act and day are co-extensive; and, therefore, the act cannot properly be said to be passed, until the day is passed. This reasoning was adopted by Lord Rosslyn and Lord Thurlow, in the case before mentioned of *Mercer v. Ogilvie*. The ground on which the judgment of the Court of Session was affirmed by the House of Lords, is correctly stated in the fourth volume of the Dictionary of the Decisions of the Court of Session. In the present case, the technical rule forbids us to consider the hour of the testator's death as the time of his death; for that would be making a fraction of a day. The day of the death must, therefore, be the time of the death, and that time must be passed before the six months can begin to run. The rule contended for on behalf of the plaintiffs, has the effect of throwing back the event into a day upon which it did not happen, considering the testator as dead upon the 11th instead of the 12th of January; for it is said, the whole of the 12th is to be computed as one of the days subsequent to his death. There seems to be no alternative, but either to take the actual instant or the entire day as the time of his death, and not to begin the computation from the preceding day.

But it is not necessary to lay down any general rule. Whichever way it should be laid down, cases would occur, the reason of which would require exceptions to be made. Here, the reason of the thing requires the

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jects fractions
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the civil law
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exclusion of the day from the period of six months given to Mrs. Pointer to deliberate upon the choice she would make; and, upon the whole, my opinion is, that she has entered into the security before the expiration of the six months; in sufficient time, therefore, to fulfil the condition on which her children were to take.

Sims v. Hampton, 1 Serg. & Rawle's Penn. Rep. 411.] This case is in point, with the Supreme Court, upon the question of appeal, but the Chief Justice of Pennsylvania leaves the general question as much aloft, as it remains in *Lester v. Garland*.

"TILGHMAN, C. J. This action was arbitrated under the "Act regulating arbitrations," passed 20th March, 1819. The award was brought to the prothonetary, Mr. Barnes, at his house, out of office hours, in the evening of the 1st August, and filed by him, and entered on the docket on the next day; so that the entry of the award was on the 2d August. There was no blame in the prothonetary, because being obliged by law to keep his papers, not in his dwelling house, but in a public building appropriated to the purpose, he cannot be prepared at all hours to make entries in his docket. On the 22d August, the defendant entered his appeal. The law allows twenty days after the entry of the award on the docket, for an appeal. The question then, is, whether this appeal was made in time. If the day on which the award was entered on the docket, is counted as one, the twenty days expired before the appeal; if not, they had not expired. In order to ascertain with certainty, whether any given number of days have expired from an act done, it would be necessary to count immediately from the act, and the twenty-four hours next succeeding, would make the first day. But this minuteness of inquiry would be attended with so much difficulty, that it has been thought best to establish a general rule that there shall be no fraction of a day, except in case of necessity. If there shall be no fraction of a day, you must either include in your computation the whole day on which the act was done, or entirely exclude it, and begin your count on the next day; and so far as truth is concerned, it is immaterial which of these ways you take. The chance of hitting the truth is as good in one way, as the other, but in neither will you probably arrive at the exact truth. It is no wonder then, if the rule of computation has been laid down differently, according to circumstances. The adjudged cases are not to be reconciled; but upon a careful investigation of them, it may be perceived, that the day on which the act is done, has been included or excluded, as the nature of the case indicated to the Court, the propriety of a rigorous or a liberal construction. There can be no doubt, but a liberal construction is proper in this case. A man may be compelled to an arbitration, much against his will. The proceedings before arbitrators are not according to the course of the common law, and therefore, when an appeal is made for the purpose of obtaining a trial by jury, every indulgence and facility, consistent with the act of assembly, should be afforded. If the authorities were all on one side, I should not be for disturbing them, however unreasonable they might appear to me, because no inconvenience is greater than uncertainty of law. But I have said before, that the decisions have been contradictory, and I

will mention one in favor of the construction to which I incline, which bears a strong analogy to the case before us. By the stat. 5 Geo. II. ch. 27, the defendant on being served with process, "must enter his appearance at the return of the process, or within eight days after such return." The construction of this statute is settled, that the defendant has eight days, exclusive of the day of return. (1 Crompt. Prac. 46. 1 Sellon, 102.) Now these words are exactly similar to those of our act of assembly. The act says, that the appeal shall be made *within twenty days after the entry of the award on the docket*. The statute declares that the appearance shall be entered *within eight days after the return of the process*. The entry of the award is an act to be done, and so is the return of process. There are many decisions on the computation of time, under rules of Court; but as it may be said, that the Court who made the rules may put their own construction on them, I choose rather to rely on the case I have mentioned, which is on the construction of a statute. One argument urged by the plaintiff, it is proper to notice particularly, because it is supported by the respectable authority of the District Court of this city. It is this: That unless the day of entering the award on the docket is included, the defendant could not enter his appeal on that day. If this were so, I should embrace the construction contended for by the plaintiff, but it does not appear to me that such is the consequence, because, if the appeal is entered on the day of the docket entry, it is certainly within twenty days from after the entry; and that would be a case in which, from necessity, the Court would reject the artificial rule of no fraction of a day, and inquire into the hour and even minute in which the award and the appeal were entered. The party has a right to enter his appeal as soon as he pleases after the entry of the award; and of this right, it would be inequitable to deprive him, by a fiction; for when we say there can be no fraction of a day, it is but a fiction; intended, like all other legal fictions, to advance justice and not to destroy it. *disfictiones juris, semper subsistit equitas*, and when it would work inequity it is always discarded. I do not conceive, therefore, that the right of entering the appeal on the same day, will be at all affected by our decreeing, that when it is not so entered, the Court will presume that the award was docketed on the last minute of the day, and allow the twenty days next following, for entering the appeal. The defendant's counsel made another point, that the last of the twenty days happening on Sunday, the law allowed one day more for the appeal. It is unnecessary to decide this, as I am of opinion, on the first point, that the appeal was entered in good time."

Yester and Bruckneridge, Jr. concurred substantially in this opinion, and the appeal was holden well brought.

The same point was decided in *Browne v. Browne*, (3 Serg. & Rawle's Rep. 496,) as to the time within which an appeal should be brought from an alderman to the Court of Common Pleas. The words of the statute giving this appeal, required it to be brought "within twenty days after judgment being given." The judgment was the 1st March, and appeal the 21st of March, in the same year, and holden well, an error to the Supreme Court of Pennsylvania.

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A promise made on the 1st of November, 1811, was sued on the 1st of November, 1817, and it was holden to be barred by the statute of limitations.

The mode of computing time often becomes important under the statute of limitations, as to which, in addition to the solitary English case of *Norris v. The Hundred of Gautris*, which is the most fully reported in Hobart, 139, the following case will be found of use:

JOHN PRESBREY *et al.* v. JOSHUA WILLIAMS, 15 Mass. Rep. 193.] Assumpsit on a promissory note, dated February 16th, 1810, payable on demand. The action was commenced on the 1st day of November, 1817. The defendant pleaded the statute of limitations, on which issue was joined. Upon the trial of this issue, before the Circuit Court of Common Pleas, for this circuit, it appeared that, on the 1st of November, 1811, a payment was made and endorsed on the note; and the plaintiffs relied on this, as sufficient to maintain the issue on their part.

The cause was entered in this Court, according to the provisions of the statute of 1817, c. 185, with a bill of exceptions containing the facts above stated.

W. & F. Baylies, for the plaintiffs, contended that the action was brought within six years, next after the new promise or acknowledgment, made on the 1st of November, 1811; and that the day of the promise ought to be excluded in the computation, as is done in the case of a note payable in a certain number of days from or after the date. (8 Mass. Rep. 453, *Henry v. Jones*.) So as to goods or estate attached, which are to be held for the space of thirty days next after final judgment, it has been decided, that the day after the judgment is rendered, is the first of the thirty days. (11 Mass. Rep. 205, *Portland Bank v. Maine Bank*.) They cited also the cases of *Pugh & ux. v. Duke of Leeds*, (Cowp. 714,) and *Holden v. James, Adm.* (11 Mass. Rep. 400,) in which last case, it is said by the Court, that where an administrator had accepted the trust on the 2d of December, 1806, the four years limited by law for bringing an action against him, expired on the 2d of December, 1810.

J. M. Williams, for the defendant, cited the cases of *The King v. Adderly*, (Doug. 463,) and *Castle & al. v. Burditt & al.*, (3 D. & E. 623,) and observed that a promissory note, made on the 1st of November, 1811, and payable in one day from or after its date, would not be payable until the 2d of November; whereas, in the case at bar, the note was payable on the 1st of November, 1811, and an action might have been commenced upon it on that day. He relied on the case of *Norris v. The Hundred of Gautris*, which is mentioned in Doug. 465, where the robbery was committed on the 9th of October, and the action was commenced on the 9th of October, in the following year; and it was held not to have been commenced "within one year next after the robbery."

JACKSON, J. delivered the opinion of the Court. In the computation of time, the question, whether the *terminus a quo* shall be included or excluded, has been differently decided, not only according to the words made use of in the different cases, but according to the subject matter or the context, where the same words are used.

By the statute of limitations, it was intended that the plaintiff should have six full years, and no more, within which to bring his action. In this case, he might have brought his action on the 1st of November, 1811, as upon the new promise then made, (supposing that the action had been previously barred by the statute,) and if he may also commence it on the 1st day of November, 1817, it would make seven first days of November, in the six years prescribed by the statute.

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In the construction of a promissory note, payable in a certain number of days, the day of the date is excluded; because, otherwise a note payable in one day, would be the same as a note payable on demand; and this is the reason given in the case of *Henry v. Jones*, cited in the argument. In the case of goods or estate attached, the legislature intended that the creditor should have thirty days, within which to levy his execution; and as he cannot sue out execution until the day after the judgment, it was rightly considered that that day ought to be excluded.

In the case of *Holden v. James, Adm.*, this point was not before the Court, as that action was not brought until long after the 2d of December, 1810. The expression quoted appears to be inaccurate, as applied to the statute referred to in that case. But whether so or not, it is manifest that the Court were not then considering whether the first day should be excluded or included; and of course, the case furnishes no authority on the point now in question.

The case of *Norris v. The Hundred of Gautris*, cited in the argument, is a direct authority in support of the opinion which we have adopted, that the action was not brought within six years next after the cause of action accrued.

JACKSON, *ex dem.* BRADSTREET, *against* CANNON.

EJECTMENT. The parties had, without trial, agreed upon a special verdict; and the plaintiff had agreed to a certain deed, to be produced by the defendant, and made a part of the verdict; and an entry according to the deed, material to the question upon the statute of limitations, which arose in the cause. The argument upon the verdict had been several times noticed by the plaintiff, and at the last October term, it was argued provisionally, that the defendant should produce the deed afterwards, for the examination of the Judges, as a part of the verdict. On its being produced, the lessor of the plaintiff discovered, as she alleged in her affidavit, that the description in the deed was broader than she originally supposed, and that the admission of the entry according to this deed, was by mistake, and affidavits were

The court will not, on affidavit, amend a special verdict agreed upon by the parties, without trial.

But if there appear to have been a mistake as to a material fact, by either party, in framing the verdict, they will order it to be vacated on payment of costs.

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read on both sides, to the point of the alleged mistake; upon which,

A. Burr, for the plaintiff, moved to amend the verdict according to the fact.

J. O. Hoffman, contra.

Curia. The verdict was drawn up and agreed upon without trial. The affidavits are conflicting as to the extent of the entry and claim, under this deed, which we perceive will be a material point of inquiry, in reference to the statute of limitations. The verdict being, by consent, an amendment upon this motion, is out of the question. We amend these verdicts, where there has been a trial, upon which the facts have come under the view of the Court and jury; but in such cases, we have something to amend by. Here there is nothing. We cannot settle this case between the parties. We must either refuse our interposition entirely, or send the cause to a jury; and we are inclined to put the facts in a train for decision, by adopting the latter course. This cannot injure the defendant. His possession remains, in the mean time, undisturbed. The proceedings on his part have, to this moment, been perfectly regular; and we think the verdict should be set aside, on payment of all the costs by the plaintiff; that the cause should go to trial upon the facts disputed here; and that the other facts stated in the verdict be taken as admitted.

Hoffman, suggested that as the proceeding was amicable, it might well be, that several of the matters stated in the verdict, were conceded on the part of the defendant, in a spirit of compromise, and he might, under the new state of things, produced by this motion, deem it his interest to controvert them upon the trial; and

The Court, in order to save the rights of the defendant in this particular, directed a

RULE: "That the special verdict be vacated, on payment by the plaintiff of all costs accrued since issue joined; and that such payment be within 30 days."

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May, 1894.

Carvey

v.

Rider.

CARVEY AND WIFE *against* RIDER.

ASSAULT and battery, on habeas corpus from the Orange Common Pleas. At the Orange circuit, in 1821, the verdict was for the plaintiffs, for 25 dollars. The defendant on a case made, applied to this Court for a new trial, which was granted, with costs to abide the event. The cause was again brought to trial at the same circuit, in November, 1823, and a verdict found for the defendant; and the only question now, was upon the taxation of costs,

Assault and battery, on habeas corpus, from the common pleas. 1st verdict, for the plaintiff, \$25. New trial, with costs to abide the event, &c. 2d. verdict, for the defendant; held, that the defendant should recover his costs of both trials.

Story, for the plaintiff, contended that the defendant was entitled to recover the costs of the *last trial only*. Both the Common Pleas and King's Bench agree in this practice. (*Rouse v. Bardin et al.* 1 H. Bl. 639, and note (b) there. *Smith v. Haile*, 6 T. R. 71. *Hankey et al. v. Smith et al.* 3 T. R. 507. *Bird v. Appleton*, 1 East, 111.) In the last case *Ld. Kenyon*, C. J. reviews all the previous authorities. And in *Howarth v. Samuel*, (1 B. & A. 566,) the Court say, "The rule as laid down in *Austen v. Gibbs*, (8 T. R. 619,) where the costs are directed to abide the event, is this, that in case the same party succeeds again on the second trial, he shall have the costs of both trials; but if the verdict be different on the second trial from what it was on the first, the party succeeding on the second trial, shall only have the costs of the second trial;" and they acted upon this principle. He also cited *Poole v. Selwood*, (1 Price's Exch. Rep. 310.) It might be said, and (for aught he knew,) correctly, that the usage of the bar had been different; but we have a rule declaring, that the practice of the King's Bench shall be ours, in cases not provided for by the rules of this Court.

Where the party succeeds, he is, *prima facie*, right; and it is enough, in justice, that the opposite party obtains a new trial, without the precedent condition of paying the costs of the first.

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M'Kissock, contra, contended that he was entitled to recover the entire costs of the suit, from its commencement in the Common Pleas, to its termination in this Court, including the costs of the first, as well as the second trial. He should not deny that the rule laid down on the other side, was settled in the English courts; but as he did not know that the question had been decided by this Court, (at any rate, no decision upon the question is reported,) he did not deem it improper to say, that the English rule is inconsistent with their statute, and with the very terms of the phrase, "with costs to abide the event of the suit." A verdict over 25 dollars against us, would carry costs; the suit being brought here by habeas corpus. (1 R. L. 344, s. 4.) And on the other hand, the statute is plain and conclusive, that the defendant shall have his full costs if he recover. (1 R. L. 343, s. 2.) On granting the new trial, the argument of the opposite side might have been used; and this Court might have imposed such a condition as would have limited our costs; but that period has gone by. No discretion—no equitable power of the Court has been exercised; and *ex termini*, we must recover our full costs. The statute is left to its full operation. The *whole costs* are, by the terms of the rule granting a new trial, to follow the event. No distinction was made by the court. The very rehearsal of the terms in which the new trial is granted, shows the English rule to be absurd. He concluded by citing *Davila v. Herring*, (1 Str. 300,) and *Burchall v. Bellamy*, (5 Burr. 2693.)

Curia, per SUTHERLAND, J. On granting a new trial, the Court exercise a sound discretion in relation to the costs of the trial which has already been had. Where the verdict is set aside for the misdirection or error of the Judge, or as being against law or evidence, the costs of the former trial are directed to abide the event of the suit; upon the principle, that the error which occasions the setting aside of the verdict, being imputable to neither party, and the case being still undecided upon its merits, there is no ground upon which the costs should be put upon the one party, rather than the other.

The construction which the Court of King's Bench have put upon the terms, "*that the costs shall abide the event of the suit,*" is this ; that if the same party succeeds again on a second trial, he shall have the costs of both trials ; but if the verdict be different on the second trial from what it was on the first, the party then succeeding, shall only have the cost of this trial. (*Howarth v. Samuel*, 1 B. & A. 566. *Austen v. Gibbs*, 8 T. R. 619.) The rule has been differently construed here. It has been understood according to the plain and natural import of its terms ; and we believe the general understanding of the profession has been, that the party who finally succeeds, is entitled to his costs upon all the previous trials, (whether he failed or succeeded in them,) if those costs were directed to abide the event of the suit. It is of no importance which way this rule is understood ; but only that it should be settled. *Whenever the costs of a former trial are directed to abide the event of the suit, the finally successful party is entitled to the costs of both trials.*

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Rule accordingly.(a)

(a) Vid. *Jackson v. Hallum*, 1 Chit. Rep. 19.

**COOPER against SPICER, SNIFFEN & ODDIE, manucaptors
of CALDWELL.**

SPICER and Caldwell became special bail for Oddie. They were excepted to, by the usual entry on the back of the original bail piece, notice given of the exception to the defendant's attorney, and Oddie refusing to justify, Sniffen became bail with Spicer, and these latter justified as special

Special bail
who are ex-
cepted to, and
neglect to jus-
tify, cease to
be bail ; and
may move to
have an *exon-*

eretur entered upon the bail piece ;

But till they do this, they may be proceeded against as bail, and their names are properly inserted in the recognizance roll.

Where one excepted to, and not justifying, was thus made a party *pro forma*, and sued, but no process served on him, *held*, that the exception was no defence for the other bail, but judgment might go against all, with a stay of execution as to the one not brought in.

Held, also, that the other bail had no right to move in his behalf for an *exoneretur*. The right is personal to himself, which he may waive, and suffer himself to be charged.

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bail. Sniffen became bail by singly acknowledging a separate bail piece; and the exception still remains on the original bail piece, no waiver thereof being entered, or intimated to either of the defendants. Judgment against Caldwell was entered the 1st day of last February term; a *fi. fa.* issued, returnable the next day, (2d day of February term,) a *ca. sa.* issued the 18th day of the same month, (the 3d day of the term,) returnable the 24th day of the same month, (9th day of the term,) the *capias ad respondendum*, against all three of the bail was issued on the 25th day of the same month (the 10th day of term) returnable the 28th day of the same month, (13th and last of the term,) which was returned *cepi corpora*, as to Spicer and Sniffen, and *non est* as to Oddie; and, on issue joined of *nul tiel record*, the cause was noticed for trial at this term; the recognizance roll having been drawn up and filed against all three of the bail. And now,

W. A. Seely, for the plaintiff, moved to bring on the trial by record.

D. Selden, contra, in behalf of Spicer and Sniffen, and pursuant to a notice duly given for the purpose, moved that an *exoneretur* be entered on the original bail piece as to Oddie; and that the recognizance roll be set aside. He cited *Humphrey v. Leite*, (4 Burr. 2107,) and *Flack v. Eager*, (4 John. Rep. 185.) Oddie should not have been included in the roll. It is an injury to him, and an irregularity as it respects the true bail, who may move to set aside the proceedings. They have a right, in this way, to avail themselves of being improperly joined with Oddie. When once excepted to, a man is not bail even for the purpose of surrendering, though his name be not stricken from the bail piece. (*Mills v. Head*, 4 B. & P. 137.) On exception and neglect to justify within the regular time, he ceases to be bail. (*The People ex rel. Works v. Judges of Onondaga*, 1 Cowen's Rep. 54. *Waterman & Wells v. Allen*, id. 60.)

Seely, in reply, agreed that the *exoneretur* should be entered as to Oddie if he had applied, but then it should be so done as not to interfere with the recourse of the plaintiff

against the other defendants. They have with a knowledge of all the facts, pleaded *nul tiel record*, the cause is noticed for trial on that issue; and it is too late for them to apply to set aside the proceedings for irregularity. They should have stayed proceedings before the plea, or have pleaded the misjoinder, if it be one, in abatement. (1 Tidd, 594.)

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Oddie was not served with process, and is not before the Court. He cannot be prejudiced by a recovery, which must be merely formal, as against him. (*Dando v. Tremper*, 2 John. Rep. 88. *Bank of Columbia v. Newcomb*, 6 id. 98. *Taylor v. Pettibone*, 16 id. 66.)

It was necessary, in point of form to proceed against all the bail, until such as are entitled to be relieved procure their names to be stricken out of the bail piece by an *exoneretur*. (1 Tidd, 224. *Tubb v. Tubb*, 1 Wils. 337. *The People v. Judges of Onondaga*, 1 Cowen's Rep. 54. *Waterman & Wells v. Allen*, id. 60. *Flack v. Eager*, 4 John Rep. 185.) The undertaking of all joint and several parties is joint as to all, or several as to each, and the plaintiff therefore could not proceed in a joint action without adding the name of Oddie. (1 Tidd, 995, 997. Hammond on Parties to Actions, 21. Aleyn, 21.)

In 1 Tidd, 224, it is said expressly, that, until the bail excepted to be stricken out of the bail piece, they are liable to be proceeded against. And in *Walter v. Green and three others*, (Say. 308,) upon a rule to show cause why two of the defendants, who had been excepted to, should not be stricken out of the bail piece, and an *exoneretur* entered as to them, the other two having justified, and a *scire facias* being instituted against the four, the master reported that the names of such persons are always continued on the bail piece, unless a rule of Court be made for striking them out. And the Court being inclined to make this rule absolute, upon its being said that, if it should be done, the other two defendants might plead *nul tiel record* to the *scire facias*, it was discharged; and a rule was afterwards made that proceedings upon the *scire facias* should be stayed as to the two defendants who applied to have their names stricken out of the bail piece. It is the uniform course to move for

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an *exoneretur*. (*Fulke v. Bourke*, 1 Bl. Rep. 462. *Humphrey v. Leite*, 4 Burr. 2107;) and if proceedings have been commenced against all, those whose names are stricken out must first pay the costs. (*Humphrey v. Leite*, 4 Burr. 2107. *Gould et al. v. Holdron*, 7 East, 580. *Fulke v. Bourke*, 1 Bl. Rep. 462. 1 Tidd, 224.) They continue bail for the purpose of surrendering the principal. (1 Tidd, 224. *Rex v. Sheriff of Essex*, 5 T. R. 633. 2 Bl. Rep. 758.)

The recognizance roll relates back to the time of filing the bail. In judgment of law it is enrolled as of that time. In technical presumption, it is filed with the bail piece, at a time when the plaintiff cannot know that the bail will be excepted to.

Curia. Had Oddie applied, we should doubtless have directed an *exoneretur*, but he is not before the Court in any shape. The other bail have no right to apply for him.

Then this exception is introduced as matter of defence upon the trial. It is said that Oddie is not bail; that he ceased to be so on entering the exception and neglect to justify. This is true to every substantial purpose. He ceased to be bail, and the plaintiff does not pursue him with the view to make him liable, but merely as a formal party to the record. There is no difficulty in seeing what the rights of parties are. The only difficulty is in the form of adjusting those rights. Strike out the name of Oddie, and the other defendants will then object the misjoinder. Oddie has never applied to have his name stricken from the bail piece; and we think he continues bail, in form till this is done. The view taken of this question by the plaintiff's counsel is correct. *Walter v. Green and others*, is in point. Oddie can never be charged as bail, if he apply for an *exoneretur*; but he may also waive that right and submit to be charged together with the other defendants. The proceeding here is under the joint debtor act. He is not served with process, and the plaintiff may have his judgment on filing a stipulation not to take out execution against Oddie; or the rule may be entered with a stay of execution against him.

HOLD: That the application in behalf of the defendant Oddie, be denied with costs, that a stay of proceedings be so granted as to preclude an actual levy upon the person or property of the defendant Oddie, under the judgment in this cause; and on reading, &c., notice of trial by the record, &c., and on reading the record of recognizance; and on motion, &c., ordered judgment for the plaintiff.

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v.
Vail.

THE PEOPLE *ex rel.* PALMER & TOMPKINS *against* VAIL,
TOMPKINS & ALLEN, Commissioners of Highways of
the Town of Newcastle, in the county of West Chester.

SEE this case ante, (1 Cowens' Rep. 589.)

J. V. Henry showed cause against the rule obtained at the last October term, which see (ante, 1 Cowens' Rep. 590,) against Nathaniel Hyatt, of Newcastle.

He read the affidavit of Hyatt, in which he stated, that he never had been a Commissioner of Highways of the town of Newcastle, but he did not deny having possession of the document sought by the relators.

Henry said that if he did not obtain the paper as Commissioner, this Court have no jurisdiction over him. They might have ordered a former Commissioner, to deliver an official paper; but their power does not extend to an individual. Besides, there is another remedy. The relators may take issue upon the return to the mandamus; and compel Hyatt to produce the paper, by a *subpoena duces tecum*, on the trial. The Court will not interfere summarily, and compel the production of a paper in reference to a pending suit, for the inspection of the opposite party. Suppose a suit upon bond; a stranger gets possession of it; you would put the party to his *subpoena*. If he disobeys this, you will attach him; not before.

S. A. Foot, in support of the rule. The Court have taken cognizance of the subject matter by the writ of mandamus. Being thus possessed of the cause, they may exercise

The sworn application of 12 freeholders for a public highway, pursuant to the 16th section of the act to regulate highways, (2 R. L. 275,) is a public document, open for inspection by all the inhabitants of the town in which the road is laid out, and belongs to the town clerk's office.

And if it come into the hands of a stranger, not a commissioner of highways, this court will compel him, by attachment, to file it with the town clerk for the inspection of a person who is a party to a suit in which the road is in question.

So for the inspection of one who is prosecuting a mandamus to compel the opening of the road.

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their usual powers incident to a cause pending. The application was not on the ground that Hyatt *is*, but that he *was* a Commissioner. He was not a Commissioner when we applied. Our being mistaken, in supposing that he once held an office, cannot vary the principle. Whether he had been Sheriff, Clerk, Commissioner, or held any other office, could not affect our rights. The ground is that the paper is a public document belonging to the town Clerk's office of Newcastle, and which this Court, therefore, have the right to control. They ordered Hyatt to file the paper. This is not like the case supposed, of a bond; a mere private paper. But pursue the bond case a little farther: Suppose a bond put on file in the Clerk's office by order of this Court; an individual takes it from the office: The plaintiff is called on by rule to produce it; but it turns out that a stranger has it: Have not this Court the power of compelling him to bring it in? What difference, whether the proceeding be by *subpœna duces tecum*, or by rule and attachment in the first instance. This Court have, not only a supervisory control over inferior jurisdictions, but also over their records. Having this power, they have a right to whatever is essentially incidental to an exercise of that power. The record must be filed and placed within their reach, before they can use it.

Henry, said there is nothing in the statute requiring this paper to be filed in any office.

Curia. It is an inquiry more important, than difficult, whether our proceedings are to be obstructed in this manner by the improper interference of an individual. This man has possessed himself of a document, which is confessedly a public one. He now admits he has the paper in question. A rule has been served on him, by which he was required to file it; but he replied that he had not, and would not do it; and this Court had no power to compel him. No authorities to show the summary power of the Court in such a case were cited on the argument, nor indeed was this necessary. That we possess the power both upon principle and authority, we do not entertain a doubt. A

party has brought his suit, the successful prosecution of which from the commencement to the termination, depends upon the inspection of this paper. Delay him till the state of the proceedings will admit of a *subpœna duces tecum*, and he may be finally defeated by a variance. To avoid this, the rule was made to file it. It is a record of the town of Newcastle, and every inhabitant of that town has a right to its inspection. It belongs to the Clerk's office of that town. The proceeding before us by mandamus was with a view to compel the opening a highway described in this paper, which is the original application of the freeholders. It came into the hands of this Hyatt, who sets the public justice of his country at defiance, by peremptorily refusing to produce it. The books are full of cases where the inspection of public documents has been ordered. A few familiar instances are those of corporation books, parish registers, books of the India Company, books of a bank, and the Court rolls of a manor, &c. (Vid. Phil. Ev. ed. of 1820, 328, 9, 330, and the cases there cited.) Is a public document to be placed beyond reach of the Court, because an interested individual chooses to plunder the office where it is deposited, or arrest it on its passage there? Suppose this had been an indictment, or other paper belonging to the files of a Court, could it be withheld under this pretence? The authority of this Court would indeed be nominal, (and the numerous authorities on this head but an idle theory) if it depended for its exercise on the avarice or fraud of any individual whether in office or not. The case may also be put upon the plain principle which punishes an obstruction of our process; as a rescue. A case directly in point, in every particular, can hardly be expected. It is without precedent in this Court; and we trust that such a high handed measure will not be repeated. The course to be pursued is too plain, both upon principle and authority to warrant us in dilating farther. We are called upon to punish this man; and he must be attached.

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Rule for an attachment.

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Whittemore
v.
Adams.

WHITTEMORE *against* ADAMS.

An insolvent discharge of a neighboring state, which exempts the person from imprisonment, but leaves the future acquisitions of the debtor liable to execution, relates to the remedy merely, not the contract, and is not of any force in this state.

Imprisonment is no part of the contract.

The *lex fori* governs the remedy.

An insolvent law does not operate as a part of the *lex loci contractus*, unless it discharge the contract.

ASSUMPSIT, on divers promissory notes, dated after the 3d of March, 1803, at Alexandria, in the District of Columbia, made by the defendant.

Plea, "that he cannot deny the said action of the said plaintiff, nor but that he did undertake and promise, in manner and form as the said plaintiff hath above thereof complained against him, nor but that the said plaintiff ought to recover against him, the said defendant, his damages sustained on occasion of the not performing of the said several promises and undertakings of him, the said defendant; but the said defendant, in pursuance of the act of Congress of the United States of America, entitled, "An act for the relief of insolvent debtors within the District of Columbia," (passed 3d March, 1803,) (a) in discharge of his person from the execution of the judgment to be obtained against him, in this behalf, by the said plaintiff in this action, according to the form and directions of that statute, says that he the said defendant, heretofore, to wit, on the 1st day of April, 1819, was in actual confinement in jail in the said District of Columbia, to wit, at the city and in the county of New York, at the suit of a creditor of him the said defendant; and that he, the said defendant, afterwards, to wit, on the 3d day of May, in the year 1819, at the district of Columbia aforesaid, to wit, at the city and in the county aforesaid, having in all things conformed himself to the provisions of the said statute, was duly discharged by the Hon. William Cranch, Chief Justice of the United States' Circuit Court of the District of Columbia aforesaid, he then being the acting Judge, according to, and by virtue of the said statute; and that the certificate of the said discharge, by the said Chief Justice, was by him the said Chief Justice, on the day and year last aforesaid, at the District of Columbia aforesaid, to wit, at the city and county aforesaid, lodged with the Clerk of the county of Alexan

dria, and by the said Clerk duly recorded, pursuant to the provisions of the said act, the said county of Alexandria being the county in which the said discharge took place; and the said defendant further says, that the several promises and undertakings in the plaintiff's said declaration mentioned and set forth, and each and every of them, were made by him, the said defendant, to the said plaintiff, before the said 3d day of May, 1819, and this he, the said defendant, is ready, &c., wherefore he prays judgment, and that his person be discharged from the execution of the judgment to be obtained against him, by the said plaintiff, in this action, according to the form of the said statute, &c."

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Adams.

REPLICATION. "And the said plaintiff, by his said attorney saith, that he ought not to be barred or precluded, by any thing, by the defendant above in pleading alleged, from having execution against the person of the said defendant; because he says that the said defendant never was discharged by the Honorable William Cranch, Chief Justice of the United States' Circuit Court of the said District of Columbia, in manner and form as the said defendant hath above, in pleading, alleged and this he prays, &c."

The cause was tried at the New York Circuit Court, before EDWARDS, Circuit Judge, Feb. 13th, 1824, and verdict for the defendant in the above issue.

The defendant had put in special bail.

On these facts, A. Spencer, for the defendant, now moved that an *exoneretur* be entered on the bail piece, and that the plaintiff enter up a special judgment against the future acquisitions of the defendant only, with costs to the defendant, to be taxed on the issue so found in his favor, within 20 days after service of notice of such rule, or that the defendant have leave to enter such judgment for him, or for such other rule, &c.

On the other hand, H. D. Sedgwick, for the plaintiff, moved for judgment, generally and absolutely, notwithstanding the finding of the jury in favor of the discharge.

Both motions were argued at the same time.

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John.

(c) 1 Burr.
301.

(d) Mather
& Strong v.
Bush, 16 John.
233.

A. Spencer, for the defendant. *Wright v. Paton*,^(b) called in question the validity of a discharge under this very act of Congress; and the Court denied its effect, only on the ground that it was not properly set forth in pleading. No jurisdiction was given by the plea, to the Judge who granted the discharge, within the rule repeatedly laid down by this Court. It was virtually holden, in that case, that the person of the defendant was discharged, though the question was not directly determined. The Court would have sanctioned the discharge, had it been properly pleaded. That case also decides, that as to the union at large, the act is a private one, of which the Courts in the several states are not bound to take notice, unless it be shown to them in pleading. The parties, then, have gone to trial on an immaterial issue, and there should, at least, be a repleader awarded. The rule laid down in *Rex v. Philips*,^(c) is that "when the finding upon the issue does not determine the right, the Court ought to award a repleader, unless it appears from the whole record that no manner of pleading the matter could have availed." In fairness and propriety, the plaintiff should have demurred, which would have given the defendant a chance to amend, on the issue in law being determined against him. He could have set forth that the contract was made in the District of Columbia, thereby incorporating the act, and making it a part of the contract, according to the constant doctrine of this Court.^(d) They will not allow the plaintiff to shut out this defence by the artifice of taking issue on the plea, having it found against him, and then moving for judgment *non obstante veredicto*. The Court should not hear the validity of a plea discussed on a non-enumerated motion, when the party might have demurred.

It is true, that the act in question provides merely for a discharge of the person, and for holding him to common bail only; and the 14th section declares, that the discharge shall have no greater effect, in any particular state, than if the debtor had been discharged under the insolvent debtor's law of any other state. The last provision will probably be relied on, as bringing the case within our decisions, which have denied all operation to discharges of other states, when both

parties were not resident there at the time of the contract. The decisions upon this question are by no means uniform. In *Miller v. Hall*,^(e) the Supreme Court of Pennsylvania gave effect to a bankrupt discharge in Maryland, though the plaintiff was a resident in Pennsylvania, and directed an *exoneretur* to be entered upon the bail piece; but a contrary decision had been before made in *James v. Allen*,^(f) and in *Donaldson v. Chambers*,^(g) a rule *nisi* was granted, on the authority of *Miller v. Hall*. The case of *Hicks v. Brown*, in this Court,^(h) is in point. The defendant had been discharged under the insolvent act of New Orleans. He pleaded the discharge here, and it was allowed. It is, accordingly, enough for us, that the discharge in question be allowed the same effect here, as if it had been granted under the law of another state. It is true, there are cases⁽ⁱ⁾ in which this Court have refused to discharge a defendant, who has obtained a foreign discharge on common bail; but the true ground of the refusal was, because the Court would not interfere summarily. The party should be put to plead his discharge. In cases, however, where bail come for relief, the Court have discharged them without plea.^(j)

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^(e) 1 Dall.
229.

^(f) Id. 188.

^(g) 2 id.
100.

^(h) 12 John
142.

⁽ⁱ⁾ *Peck v*
Hoxier & Mu-
lock, 14 John
346

^(j) *Seaman*
v. Drake, 1
Caines' Rep
9. *Kane v*
Ingraham, 1
John. Cas. 403

H. D. Sedgwick, for the plaintiff, cited Tidd. Pr. 830, for the distinction between a repleader and judgment *non obstante veredicto*. He was willing the statute should be considered a private one; for then all defence failed; it becomes apparent that a repleader would be useless, and judgment should be for the plaintiff generally.

He opposed the defendant's motion on several other grounds: 1. That the act is a mere municipal regulation of the District of Columbia. 2. That it does not warrant a plea. It gives the remedy specifically, which must be by motion to discharge on common bail. This is by the 10th section, (6 U. S. Laws, 300.) 3. The plea does not show that Judge Cranch had jurisdiction, which is indeed admitted on the other side.

As to the first point, he said the whole act related merely to the imprisonment of the body, the remedy for the debt.

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(k) *Nash v. Tupper*,
Caines' Rep. 402.

(l) 1 Dall.
188.

(m) 2 John.
Rep. 198.

(o) 7 Id. 117.

(p) 14 John.
346.

(q) 10 John.
300.

It had nothing to do with the contract. The *lex fori* must prescribe the remedy. This arises from the nature of things. Every Court has, and must abide by, its own forms; and this rule has even been applied to the statute of limitations of a neighboring state.(k) How could the law of bail or of attachment, in Massachusetts, be brought over and applied here, though the contract was made there? Different states have different times and modes of enforcing judgments, which can never be adopted here. They levy their executions on different kinds of property. The case of *James v. Allen*,(l) denied any effect to a New Jersey discharge, because it operated as a mere exemption from imprisonment, did not extend to the contract, and was, therefore, local in its effect. *Smith v. Spinola*,(m) *White v. Canfield*,(o) and *Peck v. Hoxier & Mullock*,(p) in this Court, proceeded upon the same principle. *Wright v. Paten*,(q) decides nothing as to the nature or effect of the discharge.

H. Bleeker, same side. Whether this statute be private or public, it is no bar. The late decisions of the Supreme Court of the United States,(r) and of this state,(s) relative to the effect of the records and judicial proceedings of one state, when sought to be enforced in another, have no application. It is a rule of general and universal law, that the remedy must always be governed by the *lex fori*. *Nash v. Tupper*,(t) is a strong illustration of this rule. *Hicks v. Brown* merely decides, generally, that the insolvent law of the place makes a part of the contract, where that contract is properly affected by it; but where it relates to the person, it has uniformly been treated as a modification of the remedy alone. To say otherwise, would be confounding the laws of the different states, making those of one state govern in another. Take the case of divorces. What becomes of the exclusive legislation of the state on this head, if you give effect to these local laws? So, as to foreign letters of administration, or judgments upon attachment in another state, in a suit commenced while the defendant is absent from the state, and has never been served with process. The cases giving a construction to that part of the federal constitution,

(r) *Mills v. Durye*,
Cranch. 481.
Hampton v. McConnell,
Wheat. 234.

(s) *Andrews v. Montgomery*,
19 John. 162.

(t) 1 Caines' Rep. 402.

which declares the effect of judicial proceedings, determine that effect merely as evidence, or in relation to the form of pleading. But to say that foreign records shall have the same effect throughout, and in every particular, as our own, would be to make a judgment of Pennsylvania a lien on lands here, or make their process of execution run in this state. The same principle would produce this state of things which is now set up against our remedy by *ca. sa.*

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May, 1834.

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Sedgwick, here cited the case of the *United States v. Wilson*,^(u) where it was decided that an insolvent debtor, who has received a certificate of discharge from arrest and imprisonment, under a state insolvent law, is not entitled to be discharged from execution at the suit of the United States.

(u) 8 Wheat
253.

Spencer, in reply. It is said, the *lex fori* must govern as to the remedy. To this we agree, and the illustrations advanced on the other side are all correct. But they do not apply. Here the process is all gone through with. The question does not relate to the preliminary proceedings, but the effect and operation of the judgment. Suppose the law had provided that the future acquisitions of the defendant should be protected, could he not avail himself of such a provision by pleading? *Mather v. Bush* decides, that if the contract succeed the statute, the latter is engrafted upon and becomes a part of the former. Now suppose the plaintiff had covenanted that he never would take out execution against the body, might not the defendant plead this as a release by operation of law? Would not the covenant limit the plaintiff to his execution against the property? Our objection does not relate to the remedy, but the consummation.

Chria. The defendant relies upon an insolvent discharge granted pursuant to an act of the Congress of the United States, for the relief of insolvent debtors within the district of Columbia. (6 U. S. L. old ed. 294.) The 10th section of that act declares its effect. If a debtor is arrested for any debt contracted before the discharge, the Court issuing the

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May, 1824. This discharge is founded on a *cessio bonorum*, but all the
 Whittemore subsequent acquisitions of the debtor remain liable to exe-
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Giving to this discharge all the effect which can possibly be claimed under the act of Congress, it does not operate upon the contract, but merely upon the mode of enforcing it. It is a personal discharge of the defendant—nothing more ; and must, from its very nature, be confined in operation, to the district of Columbia. The *lex loci contractus* does not apply. (*Peck v. Hozier & Mulock*, 14 John. 346.) Imprisonment is a part of the remedy, not of the contract. (*Sturges v. Crowninshield*, 4 Wheat. Rep. 200, 201.) It is obligatory on the Courts in the district of Columbia, as to bail, and the manner of proceeding upon execution. The defendant cannot be imprisoned there ; but it does not follow that he is exempt from imprisonment in this state.

A further effect is contended for, upon the principle that the contract being made in the district of Columbia, during the existence of the law, was entered into in reference to it ; and that the statute, therefore, is incorporated with, and becomes a part of the contract. This is true, so far as the nature, validity and construction of the contract is concerned ; but it has no application to the forms of judicial proceeding. (*Pearson v. Dwight*, 2 Mass. Rep. 84. *Dixon's Ex'rs. v. Ramsay's Ex'rs.* 3 Cranch, 319.) The same principle has been repeatedly acted upon by this Court, in relation to the statute of limitations of adjoining states, (*Nash v. Tupper*, 1 Caines' Rep. 102,) even where the contract arose, and both parties resided there. (*Reygles v. Keeles*, 3 John. Rep. 263.) And a long and unbroken series of decisions has denied any effect to these personal discharges, beyond the boundaries of the state where they are granted, (*James v. Allen*, 1 Dall. 188 ; *Smith v. Spicola*, 2 John. Rep. 198 ; *White v. Canfield*, 7 John. Rep. 117 ; *Sicard v. Whale*, 11 John. Rep. 194,) upon the principle, that the statutes under which they are granted are inapplicable, as a part of the *lex loci contractus* ; but constitute a part of the *lex fori* merely, (*Peck v. Hozier & Mulock*, 14 John. 346.

The case principally relied on by the defendant's counsel, is *Hicks v. Brown*, (12 John. 142.) That case gave effect to a New Orleans discharge, which extended both to the person and contract of the debtor, and the principle of that case was again recognized by this Court, in *Sherrill v. Hopkins*, (1 Cowen's Rep. 103.) Both cases are plainly distinguishable in this particular, from the present. They go beyond imprisonment, the mere remedy, to the contract itself.

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This distinction is founded not only upon authority, but upon the plainest principles of propriety and convenience; and it was well observed at the bar, that a contrary rule would confound the laws of the different states, making those of one state govern in another. Suppose a law of Columbia declaring that execution should not go till a given time after judgment; that the defendant should be imprisoned for a limited time; that he should be supported by the creditor during his imprisonment, or enjoy jail liberties to a given extent; might not these modifications of the remedy be extended to New York, with the same propriety as any more material change? Where are we to stop? On the other hand, suppose a foreign law declaring imprisonment perpetual until the debt is paid, or inflicting other severe punishment for insolvency, are our own laws to enforce these various alterations in the remedy, as a part of the *lex loci contractus*?

Nor is this discharge operative within that clause of the constitution which declares, that full faith, credit and effect shall be given to it as a judicial proceeding of another state. (Con. U. S. art. 4, s. 1. 2 U. S. Laws, new ed. 102.) This is undoubtedly true, when considered in reference to pleadings and evidence. (*Mills v. Durye*, 7 Cranch, 481. *Hampton v. McConnel*, 3 Wheat. Rep. 234.) But it is not and cannot be so in its greatest extent. The cases decide that the judicial record of one state shall not lose any thing in verity, by being carried into another; that it shall be tried by itself on a plea of *nul tiel record*. But to give the same unlimited effect to a foreign judgment, as to one of our own, would be, as remarked at the bar, to make a judgment, in one state, bind lands in another. The argument, as derived from the constitution, is very fully and ably considered by

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Shippen, J. in *James v. Allen*, (1 Dall. 168.) *Miller v. Hall*, (id. 229,) does not contradict the doctrine of the former case.

The discharge drawn in question, by the latter, probably extended to the contract; for, though decided subsequent to *James v. Allen*, which was referred to in argument, it does not profess to question that case.

The judgment must be for the plaintiff, *non obstante verdicto*.

RULE: That the motion of the defendant be denied, with costs; and that judgment be rendered for the plaintiff, generally, notwithstanding the verdict of the jury.

STEWART, SEYMOUR & HIGGINSON, executors of SHIPMAN, against HOTCHKISS.

In assumption, the defendant pleaded the general issue, and a second plea, false in fact, and about which there was some doubt as to its goodness in point of law; and on motion by the plaintiff, the court ordered it stricken out.

ASSUMPSIT. *J. Platt*, for the plaintiff, moved that the defendant's second plea be stricken out, with costs, on the ground that it is untrue, and was pleaded as a sham plea.

The motion was grounded on the following affidavits: 1st. An affidavit by the plaintiffs' attorney, that on the 21st April, 1824, he received from the defendant's attorney two pleas, one of which was the general issue; the other, a special plea, which is given below; that this plea contains about 7 folios, and is, as he is informed and believes, utterly false in point of fact, and is entirely a sham plea; that he believes it is pleaded solely for vexation and delay, and that the defendant has no defence whatever in the cause.

Second plea:—"That after the making of the said several supposed promises and undertakings, in the said plaintiffs' declaration mentioned, and before the commencement of this suit, to wit, on the 1st day of November, A. D. 1822, et, &c., the said plaintiffs and the said defendant accounted together, of and concerning the several sums of money in the plaintiffs' declaration mentioned, and so due and owing from the said defendant to the said plaintiffs, as executors as afore-

said, and of and concerning divers other sums of money then due and owing from the said plaintiffs, as executors as aforesaid, to the said defendant; and upon that accounting, the said defendant was then and there found in arrear, and indebted to the said plaintiffs, as executors as aforesaid, in the sum of 250 dollars and no more; and the said defendant, in full payment, satisfaction and discharge of the said sum of 250 dollars, in which he was so found in arrear and indebted as aforesaid, then and there made and delivered to the said plaintiffs, his certain promissory note, bearing date on the same day and year last aforesaid, whereby he, the said defendant, for value received, promised to pay the said plaintiffs, as executors as aforesaid, the said sum of 250 dollars, within ten days after the date of the said note; which said promissory note the said plaintiffs, as executors as aforesaid, then and there accepted and received, in full payment, satisfaction and discharge of the moneys so found due and in arrear as aforesaid, and of the several promises and undertakings, in the said plaintiffs' declaration mentioned: And the said defendant, in fact, further saith, that afterwards, and before the commencement of this suit, to wit, on the 30th day of November, in the year last aforesaid, at, &c., aforesaid, he paid and satisfied to the said plaintiffs the full amount of the said last mentioned promissory note, to wit, the aforesaid sum of 250 dollars, which the said plaintiffs then and there accepted and received in full payment, satisfaction and discharge of the moneys so found due and in arrear, as aforesaid, and of the several promises and undertakings in the said plaintiff's declaration mentioned: And this, &c., wherefore, &c."

The affidavit of the plaintiffs, Seymour and Higginbotham, stated, that they had never jointly or severally stated an account with the defendant, of and concerning the moneys sought to be recovered in this cause, or any other moneys due from the defendant to the plaintiffs, as executors of Sherman, nor had the defendant ever given to the plaintiffs, or either of them, in settlement, payment, satisfaction or discharge of their said demands against him, his note for the sum of 250 dollars, or any other sum, nor had the defendant

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ever paid the plaintiffs, or either of them, the sum of 250 dollars, or any other sum, in satisfaction and discharge of the demands of the plaintiffs in this suit ; that their co-plaintiff, Steward, had never taken any part in the management of the estate of the said Sherman, and had never, to their knowledge or belief, in his capacity of executor of Sherman, made any settlement with, or received any money from the defendant, or any other debtors of the estate of Sherman ; and that the plea is a sham plea, and false in point of fact in every particular ; and that the defendant had not, to their knowledge or belief, any defence either legal or equitable in the cause.

The affidavit of the defendant's attorney denied that the plea was interposed for vexation or delay, and showed that by the course of the circuit, in the county where the venue was laid, no delay would be produced ; that he believed the plea good in point of form ; but no affidavit of the defendant was produced as to the truth of the plea in point of fact, nor did his attorney swear that he believed it true.

Stower, contra, said the ground of vexation and delay failed. There was ample time to reply, and notice the cause for the next circuit in the county where the venue is laid. The plea is good both in form and substance. The case of *Strong v. Smith*, (3 Caines' Rep. 160,) shows this ; nor will it be denied. Then the application must rest entirely on the ground that the plea is not true, and the defendant may, upon the same ground be deprived of the general issue. Why confine the application to the second plea ? This is not the manner in which the plaintiffs can avail themselves of falsehood in a plea. They should reply. They may then notice their cause as an inquest ; (Reg. Gen. Nov. T. 1808 ;) and unless the defendant swear to merits, they may take their inquest even out of its order on the calendar. It is true that, formerly, false pleas were set aside with costs, but this practice has been long since exploded. These pleas are now allowed, though not encouraged. (1 Chit. Pl. 520, and the cases there cited.)

Platt, in reply, said it was not material whether the plea was good on its face or not ; if false, it should be stricken out. If false pleading be allowed at all, the defendant should be allowed to plead but one plea ; here he has pleaded two. He should be thrown back to his common law right, which allowed of but one plea. This is the only mode, according to the modern practice, in which the Court can check the abuses incident to the privilege of pleading double. It is not confined so strictly as the old practice upon this head, which required an affidavit of the truth of the plea, that it was material as advised by counsel ; and a rule or Judge's order was necessary, as a preliminary to the introduction of a second plea. Of late, the party pleads double, of course ; and leave of the Court, which is always recited, is a mere fiction not traversable. But the plea should be at the peril of the party ; if false, it should be stricken out, on motion. The object of this second plea is plain ; it was to provoke a demurrer, and hang up the cause for the purpose of delay. The defendant should be put to his affidavit.

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He concluded by citing *Pierce v. Blake*, (2 Salk. 515,) *White et al. v. Howard*, (3 Taunt. 338,) *Solomons v. Lyon*, (1 East, 369,) and *Blewitt v. Marsden*, (10 East 237.)

Curia. This plea is false in fact beyond all doubt, and there is some difficulty in saying whether it should be answered, or is demurrable. Notwithstanding the legal question which arises upon its face, we should suffer it to stand upon a very slight suggestion of its truth : none such is made. Its falsehood is conceded, and we will not suffer the plaintiff to be placed in danger of a trap, by requiring him to elect whether he will answer or demur to a plea which is not plainly valid in law upon its face, and at the same time is admitted to be untrue in fact. Take your rule.

Rule to strike out the second plea.(a)

(a) *Rickley v. Proone*, H. T. 1823, K. B. 1 Barnwell & Creswell, 286.

DECLARATION for use and occupation. Plea, that after the making of the premises, and the accruing of the several causes of action in the decla-

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ration mentioned, and before the exhibiting of the plaintiff's bill, the defendant delivered to the plaintiff one ton of Riga hemp, and 100 weight of Russia tallow, of the value of 30*l.* in full satisfaction and discharge of the premises in the declaration mentioned, and that the plaintiff accepted the same of the defendant, in full satisfaction and discharge of the several promises and causes of action in the declaration mentioned, and of all damages, &c. and concluded to the Court. A rule nisi had been obtained by Platt, that the plaintiff might sign judgment, as for want of a plea, on an affidavit stating that the plea was in every respect false.

E. Lawes, showed cause, and contended that this was a plea in common use, and that the Courts had never gone the length of saying that a party might not use a plea for the purpose of delay, provided he did not put the opposite party to the unnecessary expense of consulting counsel, by pleading pleas which require different modes of trial.

The Court, without assigning any reasons, made the rule absolute.

NOTE. This case was heard and determined at the sittings after the term, in the absence of Abbott, C. J.

Cox, widow, demandant, *against* JAGGER & BELKNAP,
tenants.

In dower, the
tenants pleaded
that the
demandant's

DOWER, *unde nihil habet*, by Mary Cox, widow of John Cox, deceased, of land, &c., in the town of Newburgh, in

son having conveyed the premises to the tenants, with warranty, &c., the demandant and her son, by writing sealed, reciting these facts, and that the demandant had agreed with her son to take a certain annual sum in lieu of dower, referred it to three arbitrators to determine the amount and the security for payment, and the demandant covenanted, that on the award being fulfilled, she would release her dower to the son, and the performance of the son was guaranteed by one of the tenants; that the arbitrators awarded a sum payable quarterly by the son, or the tenants or either of them, and that the son should pay the costs of the controversy; that a certain sum of money vested in the tenant's hands for their indemnity should be the security; and that all suits, quarrels, &c., touching the premises, should cease, &c., and that in default of fulfilling the award, the demandant might enter, &c., and the plea then averred that the costs had been tendered; that the quarterly sum had been paid to, and accepted by the demandant up to the time of the commencement of the suit; and the award in all respects performed on the part of the son and tenants: *held*, that this award was a bar to the action; that it was not necessary that a release should be awarded; that though the arbitrators might have misjudged as to the security, and fixed upon one which was insufficient, this would not affect the award, their determination being conclusive; that though the award was void so far as it provided for a payment by the tenants, and though it might be void in awarding costs, which had been provided for by the submission, yet this would not affect the whole, and it should stand and be enforced for the residue.

Where the parties have power to transfer real property, arbitrators may award that they shall do it.

An award may be good in part and bad in part.

Where the part which is void is not so connected with the rest as to affect the justice of the case, it is void only *pro tanto*.

An award that all suits touching the premises shall cease is equivalent to a release.

Orange county. PLEA, that after the decease of Cox, the husband to wit, on the 31st of May, 1821, at Newburgh, &c. Alexander Cox, the son of the demandant, and her late husband, John Cox, having been previously seised in fee simple of the premises in question, and having prior to that day conveyed the same to the tenants, with covenants of warranty, and for quiet enjoyment, and against incumbrances, Alexander Cox and the demandant, on the said 31st of May, at Newburgh aforesaid, by their certain writing, signed with their names and sealed with their seals, dated the said 31st of May, recited in substance, that whereas the said Mary Cox, as widow of the said John Cox, deceased, was entitled to dower in all that farm sold by the said Alexander, the son, to the said Belknap and Jagger, and which had belonged to the said John Cox, deceased, in his lifetime, and that the said Mary had agreed with the said Alexander, to take a certain sum of money to be paid quarterly during her lifetime, in lieu of her dower of the said farm of her said husband, deceased, and that the parties aforesaid could not agree as to the sum so to be paid as aforesaid, in lieu of her dower; and it was, by the said writing, stipulated and agreed by and between the said Alexander and the said Mary, to leave to the decision of Thurston Wood, Alexander Ross and James Waugh, to determine, as well the amount of moneys to be paid by the said Alexander to the said Mary quarterly, for her said dower during her natural life, as the amount of the security and the nature of the same by the said Alexander to be given to the said Mary for the punctual payment of the same as aforesaid, provided the award of the said arbitrators was made and ready to be delivered, on or before the

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An award does not transfer a title, but a party to it is concluded by his own agreement from disputing the title. It operates as an estoppel.

The right to dower, till assigned, rests in action only. It may be released, but the widow cannot invest another with the right to an action for it; and an award will extinguish the right.

The authority to award costs is necessarily incident to the power of arbitrators.

An award that an annual sum shall be paid in lieu of dower is valid; but a further provision, that in default of payment the demandant may enter, is void as being repugnant to the former. The latter must be rejected, but the former remains.

The rule is, that when one part of an award is irreconcilable with another, the first part shall prevail, and the latter be rejected.

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7th day of June, then next after the date of the said writing; and it was thereby further stipulated and agreed by the said Mary, that, on the fulfilment of the said award of the said arbitrators, on the part of the said Alexander, she should give him a full and entire release of dower, and damages for the detention of the same, and the said Alexander agreed to pay all the costs of the said proceedings, and the costs of the said Mary, in relation to the same; and it was thereby further agreed that the parties, the said Mary and Alexander, would abide by the decision of the said arbitrators or a majority thereof, under the penalty of 1000 dollars, the fulfilment of all which covenants on the part of the said Alexander, the tenants averred, was, on the said 31st day of May, guaranteed by the tenant Jagger, by his instrument in writing, under his hand and seal, to the writing first mentioned underwritten; that before the execution of the first mentioned writing by the said Alexander and Mary respectively, to wit, on the 31st of August, 1820, the said Alexander Cox, conveyed in fee simple, with covenants of warranty, of quiet enjoyment and against incumbrances, to the tenants, the premises in question, by means whereof the tenants entered into and were seised of the said premises as of their demesne in fee simple; that after making the said first mentioned writing, and before the said 7th day of June, to wit, on the 5th day of June, A. D. 1821, at Newburgh, aforesaid, the said T. Wood, A. Ross, and J. Waugh, did make their award in writing, under their respective hands and seals, and ready to be delivered to the said parties in difference, and did thereby award, adjudge and determine, that all suits, quarrels and controversies, touching the said premises, should cease and be no further prosecuted, and did thereby further award, adjudge and determine, that the said Alexander, or the said John and Oliver, (the tenants,) or either of them, should pay or cause to be paid to the said Mary Cox, (the demandant,) or her legal representatives, the yearly sum of 35 dollars, of and in lieu of her said right of dower, as aforesaid, to be paid to her or her legal representatives as aforesaid, in quarterly payments, that is to say, the sum of 8 dollars and 75 cents, at the expiration of each and every three months

commencing on the 1st day of May, (then) last past, (the said John and Oliver being the present owners of the property in question, and having an adequate sum vested in their hands to indemnify them.) And should the said Alexander, his heirs or assigns, or the said John and Oliver, or either of them, neglect or refuse to pay to the said Mary, or her legal representatives as aforesaid, the yearly sum of 35 dollars as aforesaid, during her natural life, to be paid quarterly as aforesaid, that then and from thence forward, it should and might be lawful for the said Mary, or her legal representatives, to re-enter into and upon the said premises, in and for her said right of dower, in the same manner as if the said award had never existed. The principal above alluded to in the said award, it was thereby declared, was the proper security to be retained, in the opinion of the said arbitrators; and the said arbitrators further awarded, ordered and determined, that all costs and charges which theretofore had existed for and on account of the above controversy, as well as the costs of the said arbitration, should be paid by the said Alexander; that the said matters above recited are the whole of the matters by the said award directed to be performed by the said A. Cox, J. Jagger, and O. Belknap, or either of them, in the discharge, extinguishment and satisfaction of the right of dower, of the said Mary Cox, in the premises aforesaid, and in the count aforesaid demanded; that the said A. Cox, after the making and publishing of the said award, to wit, on or about the 6th of June, 1821, offered to pay, and tendered to the said Mary Cox, all the costs and charges which had theretofore existed, for and on account of the above controversy, and also the costs of the said arbitration; and was then and there ready and willing, and has ever since been, and now is ready and willing to pay all such costs as aforesaid, whenever the said Mary Cox is ready and willing to receive the same; that immediately after making and publishing the said award, to wit, on the 6th of June, 1821, at Newburgh aforesaid, the said A. Cox paid to the said Mary Cox the sum of 8 dollars and 75 cents, in pursuance of the said award, which sum the said Mary Cox then and there accepted and received in full satisfaction and discharge of the one quarter part to be due and payable on the 1st day

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of August next thereafter, of the said sum of 35 dollars in the said award ordered and adjudged to be paid each and every year to the said Mary during her natural life; that the tenants paid in like manner, by the hand of A. Cox, to the demandant, 8 dollars and 75 cents, on the 8th of July 1821, being the quarterly sum payable the 1st of November, 1821, which was accepted as aforesaid; and so the tenants aver that they have kept and performed the award, &c.

The *præcipe* was returnable August term, 1821, when the demandant counted, the tenants had a special imparlance to October term, 1821, when they interposed the above plea, with a second plea of *ne unques seise*, &c. To the first plea there was a

General demurrer and joinder.

M'Kissock, in support of the demurrer. 1. The award is no bar to the action of dower, even if it were binding upon the parties. If not fulfilled, they must take their remedy upon the writing of submission, for the damages. It is an ancient and well settled principle, that awards will not affect real property or freehold, (a) though the parties would be liable to an action for non-performance. Rolle mentions an award between two copyholders, (b) and *Knight v. Burton*, (c) was an award of partition, in both of which cases the remedy was sought upon the award, the title not being affected.

(a) Rol. Ab.
Arbitrement,
(B) pl. 7
Com. Dig. Ar-
bitrement, (D.
3.) 3 Bl. Com.
16.

(b) Rol. Abr.
Arbitrement,
(K) 15.

(c) 6 Mod.
231.

(d) Willes'
Rep. 248, Kyd
on Aw. Dub.
ed. 38, S. P.

(e) Kyd on
Aw. 56.

Again; the award is void for not having ordered a release of dower. In *Johnson v. Wilson*, (d) the arbitrators awarded partition between several tenants in common; but did not direct any deeds of conveyance to be executed; and it was holden that the award was not even the subject of an action. An award of a lease for years is not binding. (e) The authorities cited all agree, that in order to affect the freehold, the award must require some act to be done by the party, capable of passing the title, which act is afterwards performed. No case can be found where a real action was ever holden to be barred by an award. Actions concerning land have been thus barred; but they are personal in their nature, as actions of trespass for damages to the

freehold ; or ejectment, which is no more than an action of trespass.(f) In trespass, accord and satisfaction would also be a good plea,(g) which will not be pretended of an action technically real.(h)

The right of dower is not the subject of a personal, but only of a real action. Even ejectment will not lie, because the demandant has no right of entry,(i) for dower at the common law, but only where her claim is in certain, as in cases of dower *ad ostium ecclesiæ*, or *ex assensu patris* ;(j) yet dower at the common law is a vested right, which was the ground of the decision in *Dampport & wife v. Wright*,(k) that a fine by husband and wife during the life of the former, and five years non-claim after his death, are a bar of dower. The cases universally lay it down, that dower shall not be barred by a collateral satisfaction, and the reason given is because it is a freehold ;(l) and in *Turney v. Sturges*,(m) it was decided in so many words, that *an acceptance of rent awarded in lieu and satisfaction of dower*, (this very case,) was no bar because the rent was not issuing out of the land whereof the demandant was dowable. It is true, the right lies in mere action, but it will not pass without the solemnity of a deed. It is like any other vested right in lands unaccompanied with possession, where the right will not pass even by deed to any other than the person in possession, for the danger of maintenance. Yet the right is not less a freehold vested, because, as in the ordinary case, it happens to be holden adversely by another. Gilbert on Tenures, 393, 4, which may be cited against us, is not opposed to this idea, for he is merely discussing the question as to what descents shall toll an entry, and he adverts to the right of dower only to place that of the heir in a stronger point of light in reference to this question. He says, that "when she is endowed, she is in from the death of her husband." Her right of possession is therefore, complete ; and the difference between her right and that of the heir is merely in the remedy.

2. This award is void for uncertainty. It is essential that an award should be certain ; otherwise it is a mere nullity.(n)

(n) Kyd on Aw. 123, 124, 129, 194, 196, 197. *Pope v. Brett*, 2 Saund. 298. Id. 293, n. n. (1.)

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(f) *Dye v. Rosser*, 3 East, 15. *Sellick v. Adams*, 15 John. 197.

(g) Com. Dig. Accord, (A. 1.)

(h) Bac. Ab. Accord and Satisfaction, B. i.

(i) *Jackson v. Clark*, 7 John. 147.

(j) Litt. a. 43. Co. Litt. 37, a. Litt. a. 39.

(k) *Dyer*, 224, a.

(l) Co. Litt. 36, b. and note, 224, by Harg. & Butler.

(m) *Dyer*, 91, a.

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(o) *Id.* Salk
71. *Winter*
v. *Garlick*, 6
Mod. 195.
Schuyler v.
Vanderveer, 2
Caines' Rep.
235. 2 Saund.
293, a. n. (1.)

(p) *Kyd* on
Aw. 259, 246.
Roll. Abr. Ar-
bitrament, (K)
pl. 13, 14.

(q) *Kyd* on
Aw. 287, 259,
260, 261.

(1) *Pope* v.
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The arbitrators award costs and expenses, without saying how much they are. This is neither certain, nor can it be made so by reference.(o) It is true, that an award may be good in part and bad in part, (Willes' Rep. 64,) but this is only where the part which is void does not enter into, and inseparably blend itself with the entire consideration for the rights which are taken away. The intention of the parties was to make out an entire sum to the widow over and above the expenses; and if the award of costs fails for uncertainty, an important item is defeated, having an intimate relation to the whole object.(p) Nor will a tender, (though we deny that any is here shown,) help the case, where the award is void for uncertainty. It may, as a general rule, and in other cases,(q) but that of badness for uncertainty is an exception to the rule.(1) Besides, this doctrine, that the award may be good in part and bad in part, does not apply when the award is pleaded in bar. In such case, it must be complete in all its parts. The separation of the parts has never been made, except where the action is to enforce the award.

Again: here is no security for performance provided for by the award. This was essential by the very terms of the submission.

3. The award is void, as purporting to bind parties, strangers to the submission. One of the tenants is totally disconnected with the award, and Jagger's becoming guarantor to the performance does not make him a party. He was a mere surety, and stood in the light of any other friend to A. Cox, having no interest in the premises. There was no such privity in the submission between the demandant and Jagger, as to bind the latter. Nor if Jagger is bound, will the award extend to Belknap, or give him the right to plead it. There was no such privity of estate, between Jagger and him, as to make it enure to his benefit. A submission by one for himself and partner, even of a personal matter, will not bind the latter.(r) A submission by a part of the partitioners shall not bind the others;(s) nor will the submission by a particular tenant affect the reversioner.(t)

(r) *Strangford v. Green*, 2 Mod. 227.

(s) *Mady v. Osam*, Litt. 20. *Hell. 4 S. C.*

(t) *Evans v. Cogan*, 2 P. Wms. 449.

4. The award is void, as being inconsistent with the terms of the submission.

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C. H. Ruggles, contra. The only question submitted was as to the amount of commutation to be received in lieu of dower. The submission was by the widow and the heir, between whom the right of dower was in question, and properly so, as the deed of submission admits. By this, the widow is estopped to say that the heir was not such a party in interest as would have a right to receive a release of dower, or negotiate in any other way for its extinguishment. Here, then, were the proper parties. They had agreed that the commutation should be quarterly, and the demandant agreed to release her dower on fulfilling the award. A readiness to fulfil and a tender is averred as to part; and an actual payment and acceptance as to the residue. The provision for re-entry is a sufficient security.

It is true, of real estate, that a mere award will not pass the title; but in all possessory actions an award may be pleaded in bar.^(u) What substantial difference is there between the demand of land in a real action, and by ejectment? In truth they are the same, differing merely in form. The demandant has a mere inchoate right not vested. She cannot transfer it till her dower is actually assigned;^(v) and the award is equally binding as a release would be.

(u) *Doe v. Rose*, 3 East, 15. *Sellick v. Adams*, 15 John. 197. *Calhoun's lessee v. Dunning*, 4 Dall 120.

(v) *Jackson v. Aspell*, 20 John. 411.

(w) *Kyd on Aw.* 61.

It is true there are some old cases which question the power to arbitrate concerning a freehold; but the authorities are all reducible to the doctrine laid down by Kyd,^(w) "That where the parties may by their own act, transfer real property, or exercise any act of ownership with respect to it, they may refer any dispute concerning it to the decision of a third person, who may order the same acts to be done which the parties themselves might do by their own agreement; therefore, when we are told that an arbitrator cannot make an award of freehold; that he cannot award the freehold of one man to another; or that partition cannot be by an award; we are to understand these expressions to mean no more than that land cannot be transferred, or a division

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made of it by the mere magic of the words of the award; but it is necessary that the award should order such acts to be done, as would, if done by the voluntary agreement of the parties, amount to a proper transfer or partition at law."*(x)*

The right of dower is complete in no other sense than that to any chose in action which the party always has the power to release; and the rule that a collateral satisfaction does not bar dower, applies merely to acts which take place, or things which are received during the lifetime of the husband. After his death, the right of dower becomes a fair subject of negotiation and transfer, like any other claim; and the proceeding here is equivalent to a sale or release by agreement, the parties calling for the intervention of arbitrators to fix the value, like *Hall v. Warren*, in 9 Ves. Jun. 605. If not good as an award, it is, at least, equivalent to a covenant not to sue, which is construed a release, in order to prevent circuitry of action.*(y)* A widow may waive or suspend her right of dower in consideration of a mere chattel interest.*(z)*

It is said, the award is uncertain as to expenses; but to this we answer that the arbitrators had nothing to do with the costs. The submission itself provides for the payment by Cox. The award of costs, therefore was a mere act of supererrogation or repetition. The award is void as to this, and good as to the residue.*(a)* The security reserved is the best which it possibly could be, viz. a right of entry into the land in default of payment.

Nor is there any force in the objection, that the award attempts to bind strangers. Jagger and Belknap are not strangers. The former was present and executed the award; and both are in privity with Cox, of whom they purchased, with covenant of warranty, &c. They would have a remedy over against him on the failure of title. An award as

(x) And vid. *Munro v. Alaire*, 2 Caines' Rep. 320.

(y) *Harrison v. Closs*, 2 John. Rep. 448. *Jackson v. Stackhouse*, 1 Cowen's Rep. 123.

(z) Park on Dower, 214.

(a) *Bacon v. Wilber*, 1 Cowen's Rep. 117. Caldwell on Arbitrations, 119. *Candler v. Fuller*, Willes' Rep. 62. *Addison v. Gray*, 2 Wils. 293.

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to a mere stranger would not be void, if there is a means of enforcing it.(b) So where the parties comprehended in the award are contemplated by the submission, though they are not directly parties to it.(c) Nor is it an objection that the award was in the alternative, viz. that Cox or the tenants should pay.(d) Besides, uncertainty in an award may be made certain by an averment and evi-^{lence}.(e)

Then the award being without objection, the only question is as to its effect. Whether a collateral satisfaction, personal in its nature, would be a bar to dower, has never been decided in this state. The question arose in *Larrabee & wife v. Van Alstyne*,(f) but this Court were divided. The cases already cited show clearly that an award would be a bar in ejectment; and the principle is the same here. It is a constructive release, founded on the election of the demandant.(g) It is of the nature of a judgment, and as such a conclusive bar.(h) There is no doubt that this award would, followed as it is by performance, be a complete defence in Chancery;(i) and we ought not to be turned over to the other side of the hall, unless the Court feel constrained to send us there by some unyielding distinction between the powers of a Court of law and equity.

M'Kissock, in reply. The fact that the widow may release, as she stipulated to do by the contract of submission, pre-supposes that she has still a right or interest in the land; and until she has, in fact, released, she may maintain her

(b) Bac. Abr. Arbitrament & Award, (E) 1. Rol. Abr. 248, 249. Stile, 152.

(c) Kyd on Aw. 160. *Onyons v. Cheese*, Lutw. 530. 10 W. 3.

(d) *Lee v. Elkins*, 12 Mod. 585.

(e) Caldwell on Arbitrations, 109.

(f) 1 John. Rep. 307.

(g) *Birmingham v. Kirwan*, 2 Sch. & Lef. 450. *Gosling v. Warburton & Crispe*, Cro. Eliz. 128. *Van Orden v. Van Orden*, 10 John. 30. *Turney v. Sturges*, Dy. 91, a.

(h) Bac. Abr. Arbitrament, (E). Kyd on Aw. 139. *Purdy v. Delavan*, 1 Caines' Rep. 304. *Weed v. Ellis*, 3 id. 253. *Armstrong v. Masten*, 11 John. 189.

(i) Caldwell on Arbitrations, 215. 2 Vern. 365, and vid. 1 Eq. Cas. Ab. Dower, B. 9 Mod. 152. 1 Br. Cas. Ch. 292.

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action. The cases quoted on the other side, and, indeed, all the cases where an award has been holden to bind lands, relate to actions which are merely possessory; nor was it ever pretended that the award, in itself, could transfer the title. I never intended to question that a right of action may be released. No doubt an action of dower may be discharged in this manner.

To say that the award operates as a release, besides contradicting the plain rules of law, is begging the question as to its validity. I have shown that no part of this award should be suffered to stand, because that which is void goes to the entire merits of the case. An award is good in part and bad in part, only where the void matter is altogether foreign to, and disconnected with that which is good. Arbitrators may award as to costs, though no express power be given for the purpose. This power is implied and incidental. (j) Costs are many times an important item in the controversy; and where the attempt to provide for them fails, the party injured should have a right to treat the whole as a nullity. These costs can never be made certain. There is no standard of calculation by which they can be reached.

(j) *Roe v. Doe*, 2 T. R. 644.

It makes no difference that this award may be enforced in Equity. We are now in a Court of law.

It is said that every one contemplated by a submission is bound by it; but it would be most dangerous to bring all persons in privity with the party within the operation of this rule. It means no more than that where the right of one party belongs to him and another jointly, and is made the subject of arbitration, the latter shall be bound by the submission of his co-tenant. It is, at least, doubtful whether the rule goes even to this extent.

An alternative award, in order to be good, must relate to the thing to be performed, not the person to perform. That the party, or a stranger, shall do the act, in the language of this award, is clearly void.

But it is a sufficient answer that in the cases where a part of the award has been enforced and a part rejected, the question did not arise in its present shape. The action was on the award and the void part was intended for the benefit

of the plaintiff, which he was content to waive. Such were the cases of *Candler v. Fuller* and *Addison v. Gray*. The mode of proceeding here leaves us no election. We are compelled to accept every part of the award, whether it be legally binding or not.

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The opposite counsel does not speak according to the cases, when he says that the acceptance of a collateral satisfaction for dower is ineffectual only where it is received before the husband's death. The case which has been cited on both sides, of *Turney v. Sturges*,^(k) is directly against him. The collateral satisfaction there, was £6 rent, accepted in pursuance of an award made between the demandant and tenant, after the death of the husband; and because the rent did not issue out of the very same land of which dower was claimed, the satisfaction was pronounced collateral, and for that reason disallowed. A case more directly in point could hardly be framed.

(k) 1 Dyer,
91, a. and vid
Moor. Rep. fol
48, pl. 167.

Curia, per WOODWORTH, J. The law is well settled, that where the parties might, by their own act, transfer real property, or exercise any act of ownership with respect to it, they may refer any disputes concerning it to the decision of arbitrators, who may order the same acts to be done which the parties themselves might do by agreement. (Kyd on Awards, 61.) The demandant's claim of dower being a proper subject of submission, the inquiry will be, whether the award is a bar to the action.

The submission and award are set out in the plea, with an averment, that after publishing the award, Cox tendered the costs, and paid to the demandant two quarters of the yearly allowance.

The authority given to the arbitrators cannot be extended to persons or things beyond the scope of the submission. An award may be good in part and bad in part, where that part which is void is not so connected with the rest as to affect the justice of the case. It is then void only *pro tanto*. (*Martin et al. v. Williams*, 13 John. 264.)

It is contended that the award is defective, in not having directed a release of dower. To this it may be answered,

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that the demandant, by the submission, bound herself, on the fulfilment of the award, to release her dower and damages. This act being provided for by the parties, it became unnecessary for the arbitrators to direct a release. It will be seen that their powers were confined to two objects—the sum to be paid, and the security to be given. Having disposed of these, there was a compliance with the terms of the submission. But, independent of this, I do not think the omission fatal, for they award that all suits touching the premises shall cease, and that the yearly sum of \$35 is in lieu of the right of dower. If, then, in consequence of the award, the demandant could not maintain an action, the effect, as it respects the defendants, is the same as if a release had been awarded and actually executed. They are equally protected. The principle upon which an award is held to be a bar, where the title to land is submitted, is, not that it can have the effect of conveying the land, but that the party is concluded, by his own agreement, from disputing the title. The parties consent that the award shall be conclusive as to the right, and that is sufficient to bind them. (*Doe v. Rorer*, 3 East, 16.) In the case of *Sellick v. Adams*, (15 John. 197,) the arbitrators fixed the boundary between the land of the parties. It did not appear that a release was awarded, yet the Court held that the award would have been sufficient to enable the party to recover in ejectment; and in *Shepard v. Ryers*, (15 John. 497,) where the parties covenanted to execute releases according to the division to be made by the arbitrators, the doctrine is recognized, that though an award may not have the operation of conveying the land, it may estop a party from setting up his title. It has been adjudged, that when it is awarded that one party shall pay money or deliver up any particular thing in satisfaction of actions and suits, the Court will imply a release from the other party to be intended by the arbitrators. (*Mawe v. Samuel*, 2 Rol. Rep. 1. 12 Mod. 234. Caldwell on Arbi. 129.) It has also been held, that where any thing is awarded in satisfaction, there the award itself is a bar before it is performed. (Caldwell, 212. Carth. 378. Ld. Raym. 247. Salk. 69.)

But, on another ground, I think this objection cannot prevail. The right to dower, until it is legally assigned, is a right resting in action only. The widow may release her claim, but she cannot invest another person with the right to maintain an action for it. (1 Cruise's Dig. 159, s. 2. 17 John. 168. 20 John. 413.) It seems to me of necessity to follow, that the award operates as an actual extinguishment of the right resting in action, when it declares that the action itself shall not be prosecuted, and that the money is in lieu of the claim. I do not perceive that the award is void for uncertainty. It is explicit as to the payment of the money. As to the security intended to ensure the regular yearly payments, there is some obscurity; yet it is sufficiently plain to show what the arbitrators intended the demandant should rely on. They considered the money retained by the defendants as constituting her security. Whether that was adequate, or whether it could, in fact, be resorted to by the demandant, in case of a default, is not the question. If they misjudged on this point, it cannot affect the award. It was submitted to them to point out the security, in their judgment, deemed sufficient. This has been done; and the demandant cannot now object to it.

It is also urged, that the award is void, because it purports to bind persons strangers to the submission. It is undoubtedly void so far as it requires the defendants to pay; but granting this, it does not affect its validity as to Alexander Cox. The award is, that Cox, or one of the defendants, or either of them, shall pay. It is within the rule recognized in *Martin and others v. Williams*.

It is also objected, that the arbitrators had no power to award as to costs. If that be granted, it cannot affect the residue of the award; for it is not connected with, but a distinct question from the one, whether the right of dower is barred. It may, too, be rejected as surplusage; for the submission provides, that Alexander Cox shall pay all costs. It was evidently not intended that the costs should be under the control of the arbitrators. If, however, nothing had been said respecting costs in the submission, it was a power

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NEW YORK, necessarily incident to the authority of the arbitrators. It
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Every valid award must be final, so as to put an end to future litigation. Here it is provided, that on the neglect or refusal to pay, the demandant may enter, as if the award had never existed. . This provision is clearly bad. The first part of the award is final, for it awards the sum of money to be paid, and describes the security for performance. The latter part is repugnant to the former, and must be rejected; but the former part is valid. The rule is, that when there is any contradiction in the wording of an award, so that one part is irreconcilable with another, the first part shall prevail and the latter be rejected. (3 Bulst. 62. Pop. 15, 16. Caldwell, 130. Kyd, 216, 217.) On the whole, I am of opinion that judgment on the demurrer be entered for the defendants.

Judgment for the tenants.

CORNELL against LAMB.

There are three kinds of rent, viz. rent service, rent charge, and rent seck. Their nature and difference between them.

THE first count was trover for certain goods and chattens of the plaintiff, which the defendant had distrained and sold for rent, claimed by him to be due from the the plaintiff: The second count was in case, upon the 9th section of the "act concerning distresses, rents and the renewal of leases," pas-

For a rent service, the landlord may distrain of common right; but for a rent charge only in virtue of a clause of distress. He cannot distrain for a rent seck, for the statute, 4 Geo 2, ch. 28, which gives distress for all rents, has not been enacted in this state.

Fealty is not, in fact, due upon any tenure in this state. It is altogether fictitious. It is retained by statute as to lands holden in *socage*, and abolished as to all grants made directly from the state; (1 R. L. 70;) but the right to distrain is not impaired by the statute. It remains as at common law, by which fealty was incident to every tenure, and the right of distress incident to fealty; and even if the latter be taken away, yet, where it would have existed at common law, distress may be made.

So that a distress may in all cases be made upon a lease by parol, which would be valid by the statute of frauds, where the lessor retains the reversion.

Semble, fealty is no longer necessary to support the right to distrain.

The common law right of distress was not intended to be abolished, but to be preserved in full force, by the act concerning distresses, rents and the renewal of leases. (1 R. L. 234.)

ed April 5 1813, (sess. 37, ch. 63, 1 R. L. 435,) for distraining when no rent was due, and claiming double damages. **NEW YORK,**
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The cause was tried at the Saratoga circuit, May 28th, 1822, before his honor (the late) Mr. Justice Yates.

At the trial, the counsel agreed that the property mentioned in the declaration, was taken by the defendant from the plaintiff, on the 1st day of May, 1820, by William Prime, bailiff of the defendant, under a warrant of distress, executed by the defendant, and pursuant to his directions, for 120 dollars, for 4 years and 11 months rent, claimed to be due and unpaid from the plaintiff to him; that the property was regularly advertised and sold for 30 dollars, pursuant to the 5th section of the act; and the only question made, was upon the defendant's right to distrain.

It appeared that the lease was by parol, and that the plaintiff and defendant having, on settlement, struck the balance of rent, the plaintiff, by an instrument under seal, had covenanted to pay the defendant the balance thus found due, for which he afterwards distrained; that the defendant had brought his action, for use and occupation, in the Common Pleas of Saratoga, for the balance over and above what was paid by the distress, and recovered, upon which the covenant was cancelled.

Upon this evidence, a verdict was taken for the plaintiff, for 123 dollars, subject to the opinion of this Court, upon a case containing the above facts.

S. G. Huntington, for the plaintiff, made the following points: 1. That a man cannot distrain upon a lease by parol. 2. That the covenant merged the claim for rent. 3. That it did not appear that the defendant had any reversionary interest.

He said there were three kinds of rent known at the common law, in reference to the remedy by distress; rent service, rent charge, and rent seck. (a) Rent service had some corporal service incident to it, as, at least, fealty; and for this only, could the person to whom rent was due, distrain, without reserving a right of distress by the contract granting

(a) *Bradby*,
23, 33. *Litt. a*
219. 2 *Bl.*
Com. 42.
3 *Cruise Dig.*
307, a. 6.

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(b) Ibid. Co.
Litt. 142, a.
1 Burn. J. 425.

(c) Ibid.

(d) Ibid.

(e) 1 R. L.
70, 71.

(f) 2 Bl.
Com. 42. Litt.
a. 217, 218. 3

Cruise's Dig.
308, a. 8.

Woodf. L. &
T. 152. Brad-
by, 23.

(g) 2 Bl.
Com. 42. Brad-
by, 23. Litt. a.
217, 218.

Woodf. L. &
T. 52. 3

Cruise's Dig.
309, a. 12. 1

Burn. J. 425.

(h) Bradby,
35, 36, 100. 2

Bl. Com. 43.

3 id. 7. Woodf.

L. & T. 380. 3

Cruise's Dig.

330, a. 72.

(i) 1 R. L.
435, a. 5.

(j) Bradby,
221. Woodf.

L. & T. 399.

(k) 1 R. L.
71, a. 4.

(l) Litt. a.
131.

(m) Co. Litt.
134, a. id. 93,

a.

(n) Id. 87,

b.

the rent.(b) This rent service, is a creature of the feudal system,(c) and for it, when in arrear, the landlord could always distrain of common right.(d) The feudal system with all its appendages, is completely abolished by our statute concerning tenures ;(e) and it follows, that there can be no such thing as rent service created since the passage of the act, but only a rent charge, which is so called, because a right to distrain is expressly reserved. The right to distrain in such case, is by virtue of the agreement, and not at common law.(f) Without such agreement, it would be rent seck.(g) Hence the landlord could not, in this case, distrain at common law, because his rent was seck ; and the law stood thus in England till the Stat. 4 Geo. 2, c. 28, s. 5,(h) which authorizes the landlord to distrain in all cases for rent arrear. We have no such statute in this state. Our statute(i) grants no remedy by distress, in cases where it was not given by the common law, but only points out the manner in which distresses shall be treated and disposed of, when lawfully taken. It is merely a transcript of the 2 W. & M. c. 5, s. 2,(j) which was passed long before the statute enlarging the right to distrain, and there can be no pretence that it would have this effect. The books refer to the statute of Geo. 2, alone, as giving the right to distrain for a rent seck.

E. Cowen, contra, said it is true that the feudal system, with its appendages, were abolished by the statute cited, but the tenure of free and common *socage* was expressly, by the same act, made the tenure of the state. All tenures were turned into *socage*,(k) with its common law incidents, one of which is *fealty*. *Socage* tenure has nothing to do with the feudal system ; this was a military establishment. The services in relation to tenure in *socage*, were entirely different from those which were due to the feudal landlord. Fealty is incident to every tenure except *frankalmoign*,(l) and was of course retained in our system with *socage* tenures. It is inseparable from every reversion on a lease for life or years ;(m) and whenever a tenant holds of his lord at a rent, it is service, as fealty at the least.(n) Fealty, is of itself

a service, and gives character to the rent : for wherever fealty is, distress is inseparably incident to it.(o) Whatever the rent may be payable in, by the contract, fealty follows of course, if there be a reversion, and turns it into a rent service, for which distress lies ; for, according to the admission on the other side, the lord may distrain of common right, for a rent service. We then claim the right to distrain at common law. We claim this right as incident to the tenure of free and common *socage*. We do not ask the aid of the 4 Geo. 2, c. 28, s. 5, which we agree has not been enacted in this state, and we cannot, therefore, distrain for a rent seck ; but we have a right to distrain upon the plaintiff as upon our tenant, by fealty and certain rent. It is true that fealty is generally exploded in practice between landlord and tenant, both in England and in this country. With us, it is the merest fiction ; but still it exists in contemplation of law, for the purpose of upholding other rights. It is expressly mentioned in our statute of tenures, with a view to those rights. In all cases, except in that of an absolute grant from the state, since the 20th Feb. 1787,(p) our lands are holden in *socage*. And of lands demised by the state since that time, to their tenants, or where the absolute grantee underlets, so that the relation of landlord and tenant is created, the holding is still in free and common *socage*, to which distress is incident of common right. This is so, because there is a reversion to which fealty is incident,(q) and the right of distress follows fealty,(r) which makes a rent service. The common law, therefore, is not changed by the statute. It is left to its full force, and is the only basis on which the right to distrain, in this state, rests. It is neither enlarged nor diminished by any statutory provision. In only one case are our tenures allodial, and that is, where the grant is absolute from the state, and made since the statute of tenures was passed.(s)

This lease, then, though by *parol*, being good within the statute of frauds, entitles the landlord to distrain. That he may distrain upon a *parol* lease, is virtually decided by several cases in this country.(t) That it might be done in England, at the common law, is well settled ;(u) and indeed, not

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(o) Id. 151,
a, b.

(p) 1 R. L.
71, a. 6.

(q) Co. Litt.
143, a, 93, a.
(r) Id. 151
a, b.

(s) 1 R. L.
71, a. 6.

(t) *Smith v*
Colson, 10
John. 91. Jacks
v. Smith 1
Bay's Rep
315. *Smith v*
Sheriff of
Charleston, id
443.

(u) *Bradby*
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denied on the other side. The same common law right is reserved to us, by the constitution.

WOODWORTH, J. The principal question in this case is, whether a landlord can distrain for rent, without reserving a special power of distress. At the common law, there were three kinds of rent; rent service, rent charge, and rent seek. The first is, where the tenant holds his land by fealty and certain rent, or by rendering services, as ploughing the land, shearing the sheep and the like; for these the lord might distrain of common right, provided he had in himself the reversion, and the service be certain, or capable of being reduced to certainty, so that upon the avowry, he might be able to ascertain and recover damages for non-performance. (Cok. Litt. 96, a. 2 Crui. 307. tit. 28, ch. 1, sec. 6. 2 Black. 42. 10 John. 92.) The right of distress was inseparably incident, as long as the rent was payable to the lord, who was entitled to the fealty. To every tenure, fealty is incident, so long as the tenure remains. (Cok. Lit. 93, a. 2 Cruise, tit. 28, ch. 1, sec. 6.)

But a right of distress was not incident to a rent charge, because there was no future interest or reversion, and no fealty was annexed to such grant; the land became chargeable by virtue of a clause authorizing a distress. (2 Cruise, 308. 2 Black. 42.)

In England, the same remedy is extended to all rents alike, by the statute, 4 Geo. 2, ch. 28, which has, in effect, abolished all material distinction between them. This statute has not been enacted in this state. Our act concerning distresses, (1 R. L. 434,) contains the provisions of a number of British statutes, regulating the proceedings by way of distress, but not expressly defining what shall constitute a right to distrain; it would, therefore, seem, that where there is not a clause of distress, the landlord's right to this remedy cannot be more extensive than that given by the common law, which is limited to rent service. It is contended that the right to distrain is founded on the right of the landlord to demand fealty, and cannot be supported merely by showing a reversionary interest. This was undoubtedly the com-

mon law in England, before the statute of 4 Geo. 2; but that statute, in effect, merged all preceding remedies, by allowing a distress to be taken for any kind of rent in arrear. (Woodfall, 305.) It is admitted that fealty is not, in fact, due on any tenure in this state; it is altogether fictitious. The act concerning tenures (1 R. L. 70) declares, that all tenures held at any time before the 4th July, 1776, are turned into free and common *socage*, and shall be discharged from certain feudal services, particularly enumerated, and that the tenure upon all grants made by the state, shall be allodial, and not feudal, and be discharged of fealty and all other services. The fifth section of this act provides, however, that it shall not be construed to take away or discharge any rents certain, or other services incident to tenure in common *socage*, or the fealty or distresses incident thereto. Independent of this section, I apprehend that the right to distrain would remain upon every demise for a rent certain, where the reversionary interest was in the landlord. At the common law, if fealty was due, and the reversion in the landlord, he might distrain: by the discharge of fealty, it cannot be intended to take away the remedy by distress, but leaves it as the statute found it, so that, thereafter, it would depend on a rent certain and a reversionary interest. The abolition of a feudal service, in case of the tenant, cannot take away a right previously existing in the landlord. It seems to me, that the plain inference to be drawn from the act is, that fealty was no longer necessary to support the right to distrain.

But if this were questionable, the 5th section, in my view, secures the right, by declaring that the fealty or distresses incident to rents or other services, belonging to tenure in common *socage*, shall not be taken away. If fealty be considered necessary to support a distress, the statute intervenes and declares that the non-existence shall not be alleged to defeat the remedy. The act concerning distresses, does not expressly define the cases in which a distress may be lawful: I think it, however, manifest from its provisions, that the common law right was not intended to be abolished, but preserved in full force. The 6th section declares, that it shall be

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lawful for any person having rent in arrear, upon any demise, lease or contract, to seize sheaves of corn, hay, &c., for, and in the nature of a distress. By the 13th section, the landlord is authorized to seize the goods of a lessee for life, or term of years, where the goods are removed from the demised premises, leaving the rent unpaid. By the 17th section, it is declared to be lawful for any person, having any rent in arrear, upon a lease for life, or years, or at will, ended or determined, to distrain for such arrears after the determination of the lease, in the same manner as he might have done if the lease had not been ended. It will be perceived that nothing is said about the clause of distress; the remedy is absolutely given, if there is rent in arrear. In all these cases, there was a reversionary interest in the landlord. The statute evidently supposes a right to distrain before the termination of the lease, by allowing it after the lease is determined. The defendant, then, had the power of distress, which was a concurrent remedy. The acceptance of the sealed note was not an extinguishment of the rent, as was decided between these parties. (20 John. 407.) The case states, that the defendant admitted he had distrained for 4 years and 11 months rent due him, at the time of such distress, including the amount specified in the writing sealed. This admission was not objected to; it must be presumed to have been inserted as evidence; and if so, it is proof that the rent was due.

But it is contended, that it does not appear the defendant had the reversionary interest in him. No question of this kind appears to have been raised at the trial; there is no express evidence of a reversionary interest, but it may well be presumed to exist; for it is admitted in the case, that the defendant recovered a judgment in an action for use and occupation, in the Court of Common Pleas, for the rent now sought to be recovered by way of distress. This judgment was affirmed in the Supreme Court. (20 John. 407.) It is settled, that, at the common law, assumpsit would not lie for rent; it was recoverable only by action of debt; the statute gave the action for use and occupation, for the purpose of obviating some of the difficulties that might occur in the re-

covery of rents where the demises are not by deed. The legal presumption is, that the demise, in this case, was not by deed ; had it been, the party would not be entitled to recover. It is also well settled, that no estate of freehold, for life or in fee, can pass by an instrument in writing not under seal. (12 John. 73.) It follows, then, that the defendant, when he distrained, had the reversionary interest, and is, therefore, entitled to judgment.

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SAVAGE, Ch. J. The main point is, whether the defendant had a right to distrain for the rent due him. If this is not a case in which the landlord had a right to distrain then the sealed note was an extinguishment of the rent, and, of course, the defendant is liable to this action.

At common law, there were three kinds of rent :

1. Rent service, so called, because it had some corporal service incident to it, at least fealty, or the feudal oath of fidelity. Where fealty is due, therefore, with a pecuniary rent, and the landlord has the reversionary interest in the demised premises, then the landlord has, by the comm law, a right to distrain without any power in the lease.

2. Rent charge, is a rent reserved where the landlord has no reversionary interest. He would have, for such rent, no right to distrain, unless the power be contained in the lease.

3. Rent seck, is the same as rent charge, except that there is no right to distrain reserved. By statute of 4 Geo. 2, ch. 28, the right of distress is given in the two last kinds of rent ; but, independent of that statute, the right of distraining existed when the landlord was entitled to the reversion and to fealty.

By our old constitution, such parts of the common law and of the statute law of England, and such acts of the colony as together formed the law of the colony, on the 19th day of April, 1775, are declared to be the law of the state. By our statute concerning tenures, (1 R. L. 71,) all tenures of any estate of inheritance at the common law, are declared to be turned into free and common *socage* ; and by the common law, fealty is incident to this tenure. In all cases, therefore, where the tenure in this state is not allodial, and where

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the landlord is entitled to the reversion and to a rent, he is authorized to distrain for such rent, without any authority for that purpose in the lease or contract.

The defendant having, then, as is fairly inferable, the reversionary interest, he had a right to distrain, and the note was no extinguishment of the rent. In my opinion, therefore, judgment must be rendered for the defendant.

SUTHERLAND, J. concurred in the result of these opinions.

Judgment for the defendant.

SCHUYLER *against* LEGGETT.

A lessor may distrain upon a parol demise, he having the reversion, without any special agreement empowering him to distrain.

Tho' a parol demise for 7 years be void by the statute of frauds, yet it enures as a tenancy from year to year, if the tenant enter and hold under it; and it will regulate the terms of the tenancy in other respects; as the rent, the time of year when the tenant must quit, &c.

REPLEVIN for one span of horses and a pleasure waggon. Avowry for rent arrear.

The cause was tried at the Saratoga circuit, May 28th, 1822, before his honor (the late) Mr. Justice Yates.

On the trial, the plaintiff introduced and read in evidence, a stipulation signed by the attorneys of both parties, as follows: "We do hereby stipulate and agree to admit, on the trial of this cause, that William Griffeth took the property of the plaintiff, mentioned in the plaintiff's declaration in this cause, on the day and at the place therein stated, as the agent and bailiff of the defendant in this cause, by virtue of a warrant of distress delivered to him by the defendant, for 18 months rent, claimed to be in arrear and due to him, from the plaintiff, and that the proceedings in making the distress were perfectly regular and legal, provided the said defendant had a right to distrain; and that the said plaintiff replevied the said property, before it was removed from the premises on which the said distress is alleged by the defendant's

Whether, where the landlord executed a lease for 7 years, and left it with a depositary appointed by the lessee, for him to execute on his part, which he agreed to do, but neglected, and yet took possession of the premises and held them more than a year, the landlord may consider the lease as executed by the tenant, and distrain under it. *Quere.*

avowry to have been made, and within five days from the notice of the same, which notice is also admitted to have been regular, and according to the directions of the act in such case made and provided.—Dated October 17th, 1821.

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George Palmer, Esq. a witness on the part of the plaintiff, testified, that he, as the agent of the defendant, had the charge of a house and lot situate in the town of Stillwater, and county of Saratoga, (the premises mentioned in the avowry,) belonging to the defendant; that the plaintiff held and occupied the premises, as tenant, from year to year, (of the defendant,) for several years previous to the drawing of the lease, as hereinafter mentioned, at a rent of 140 dollars; that in the spring of the year 1817, it was agreed between the plaintiff and the defendant, that the witness should draw a lease from the defendant to the plaintiff, of the premises, for the term of seven years, at a rent of 100 dollars per annum, payable half yearly, with provision therein, for making certain repairs, which lease was accordingly drawn by the witness, under the direction of both parties, with a counterpart; that pursuant to a similar direction, and understanding of both parties, Leggett, the defendant, executed both parts of this lease, in the hands of the witness, and left them, pursuant to the directions of the parties, with the witness to be executed by Schuyler, the plaintiff; that Schuyler neglected formally to execute the lease, by either signing and sealing, or delivering it, but left it lying in the witness' hands, with the *ex parte* execution of Leggett, without objection or question of its validity, and continued the occupation and use of the premises, as he had done before the agreement, for more than a year and a half from the commencement of the term mentioned in the lease.

The counsel for the defendant produced the lease in evidence, and contended that the plaintiff was entitled to a verdict, and that Leggett had no right to distrain for rent: 1st. Because there was no demise by Leggett to Schuyler, either implied or expressed. 2d. If there was a demise, it was by parol, for seven years, and, therefore, void by the statute of frauds and perjuries. 3d. Because Leggett could not distrain for rent under a parol demise.

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His honor the Judge overruled these objections, and directed the jury to find for the defendant, who found accordingly.

S. J. Huntington, for the defendant, now moved for a new trial. He insisted that if the last agreement was not a letting of the premises, there was no rent due for which Leggett could distrain. If, under an agreement for a lease at a certain rent, the tenant is let into possession before the lease is executed, the lessor cannot distrain for rent during the first year; for there is no demise expressed or implied. (a) An agreement to let will not operate as a lease, if a future executory act was in view. (b) The old letting was at end by the last agreement. The cases in which the tenant has been considered as being in under the terms of an old lease, where he holds over after his term has expired. (c) are those in which no new contract was entered into. The new lease here differs in terms from the old.

(a) *Hagan v. Johnson*, 2 Taunt. 148.
Hearn v. Tomlin, Peak. N. P. C. 192.
Browne v. Warner, 14 Ves. 413.
Smith v. Stewart, 6 John. Rep. 46.

(b) *Browne v. Warner*, 14 Ves. 413.

(c) *Woodf. L. & T.* 20, 218.

Again: this was a demise for seven years, by parol, and void, therefore, by the statute of frauds.

[The counsel also raised the objection, that the lease being by parol, and containing no clause of distress, the defendant for that reason, had no right to distrain, upon which the arguments were the same as in the next preceding cause.]

E. Cowen, contra, relied upon the case of *M^r Leish v. Tate*, (d) as in point for the defendant. There the Court gave effect to an unexecuted lease for nine years, on the ground that the lessee had held under it, and the landlord expressed a willingness to execute it; but the tenant declined. An avowry was sustained upon a mere draft of a lease not executed by either party. The present is certainly a much stronger case for the avowant. In *Hagan v. Johnson*, cited from 2 Taunton, which was the case of a holding under an executory agreement to execute a lease, the landlord distrained before the year had passed. There could, therefore, be no tenancy from year to year, which plainly exists in this case. Here has been more than a year's holding under the new lease. If this was void, either by the statute of

(d) *Cowp. Rep.* 781.

frauds, or because it was never executed, then comes the holding over under the old lease. Upon one or the other of these grounds, the plaintiff was a tenant from year to year, at the rent talked of between the parties. The agreement and draft of the lease will, at least, amount to an admission that the premises were worth the sum mentioned in the lease, and a promise to pay that sum. This would be a parol lease, under which the defendant might distrain.

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Curia, per SAVAGE, Ch. J. The cases cited by the plaintiff's counsel show, that to entitle the landlord to distrain, there must be a letting, and an agreement to pay rent—that an occupancy under an agreement for a lease at a future time is not sufficient. The facts in this case show an occupancy, in the first instance, under a parol demise from year to year. When the new arrangement was made, a parol agreement must have preceded the directions to Mr. Palmer to draw the lease. Though this lease was never, in fact, executed by Schuyler, yet his occupancy was either under this lease, or the parol agreement, in pursuance of which the directions were given for the lease. In either case, there was a letting by Leggett to Schuyler, and an agreement by Schuyler to pay the rent. If the occupancy has been under the lease, then, having accepted possession under it, he takes the estate subject to the covenants and the conditions contained in it. In that case his liability exists, and also the landlord's right to distrain. If the occupancy has been under the parol agreement, then he has held under a parol demise for seven years; which, though it is void as a lease for the term, yet it enures as a tenancy from year to year, (*Clayton v. Blakey*, 8 T. R. 3,) and must regulate the terms on which the tenancy subsists in other respects; as the rent, the time of the year when the tenant must quit, &c. (*Doe v. Bell*, 5 T. R. 471. Roberts on Frauds, 244, 5, 6.) Rent being due by the terms of the parol demise, the landlord's right to distrain was perfect; and the defendant was at liberty, under the avowry in this case, to avail himself of either a parol or written lease. In my opinion, the defendant must have judgment.

New trial denied.

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THE NEW YORK FIREMEN INSURANCE COMPANY
against STURGES.

Discounting a note at 7 per cent and taking the interest in advance, is not usury, either in bankers or others.

A corporation having no power, by the act of incorporation, to discount notes but created for the purposes of insurance, has no right to carry on the business of discounting.

ASSUMPSIT, against the second endorser of a promissory note, drawn by Peters & Harrison, in favor of Thomas C. Butler, jun. and endorsed by him and the defendant. The note was dated the 11th of January, 1819, payable four months after date, for 1000 dollars,

The cause was tried before his honor AMERSON SPENCER, late Chief Justice, at the Sittings in New York, June 7th, 1821.

William McNeil, a witness on the part of the plaintiffs, proved the hand-writing of the drawers, and of both the endorsers. David Codwise, another witness for the plaintiffs, proved demand of payment from the drawers, on the 14th of May 1819, and notice of non-payment to the endor-

A corporation has no powers except such as are specially granted, and those that are necessary to carry into effect the powers so granted.

The New York Firemen Insurance Company was incorporated, for the purposes of insurance, in 1810, and in 1818 an act was passed continuing that company till 1823, for the purpose of closing and winding up their business. On the 30th of August, 1817, O. & H. owed several debts to the company, and B. owed another, for which several debts they took of B. a note made by P. & H. payable at 4 months from the said 30th of August. These debts were all due for premiums of insurance. The company made a calculation upon the note, deducting \$23 92, interest for the 4 months, at 7 per cent, then deducted the debts, and paid the balance, which was \$20, to B. When this note became due, P. & H. offered a new note in renewal, also at 4 months, which the company took, deducting as before \$23 92, for the interest, and giving their check to P. & H. for the balance, and the old note was taken up. The second note was renewed in like manner for P. & H. from 4 months to 4 months, till Jan. 11th, 1819, when the last note was given. The discount taken was the fraction of a cent more than the interest would amount to for the 4 months, including the 3 days of grace. Held, that the company had a right to continue a debt, originally lawful, in this manner; that the last note was, therefore, valid; and that it was not usurious, though the interest was taken in advance, with such a trifle beyond the interest; nor is such a transaction forbidden by the act to restrain unincorporated banking associations. (1 R. L. 234.) It cannot properly be called the *business of discounting*, which, it seems, was alone intended by the words, "*making discounts*," in the restraining act.

A debt due to an incorporated company will be presumed to have been contracted in the lawful course of business, until the contrary is shown.

Where a trifling excess is taken, on discounting a note, beyond the legal interest, it will be presumed to be by mistake, and not by the adoption of an erroneous rule of calculation, until the latter is shown.

Taking beyond the legal interest, by mistake, is not usurious;

Though, it seems, it would be otherwise, where the excess arises from the voluntary adoption of an erroneous rule of calculation.

ers, on the following day. The note was then read by the plaintiffs. William McNeil, being cross-examined by the counsel for the defendant, further testified; that he was now, and had been since the year 1810, secretary of the company; that the note was offered by and discounted for Peters & Harrison, and a check for the amount, deducting 23 dollars and 92 cents for the discount, given to them therefor, to enable them to take up their note of a similar amount, which fell due that day, and of which the plaintiffs were the holders; that on the 30th of August, 1817, the plaintiffs were the holders of certain promissory notes, drawn by Ogden & Harrison, and endorsed by Thomas C. Butler, amounting to about 500 dollars for premiums of insurance; which notes were, at that time, lying over due and unpaid; that at the same time Thomas C. Butler was indebted to the plaintiffs in another sum of upwards of 400 dollars, (the precise amount the witness could not tell,) and that on the said 30th of August, he offered a note drawn by Peters & Harrison, to the plaintiffs, for 1000 dollars, for discount, the proceeds to be applied in payment of the notes of Ogden & Harrison, which note was payable at 4 months from the said 30th of August; that the plaintiffs, thereupon, made a calculation upon the note, and deducted therefrom, in the first place, 23 dollars and 92 cents, being the interest for the four months the note had to run, calculated at the rate of 7 per centum per annum; they then deducted the amount of the notes of Ogden & Harrison, and of the debt of Thomas C. Butler, and paid to Butler the balance of the note in money, which balance amounted to somewhere about 20 dollars. He further stated, that when the note, dated the 30th of August, fell due, Peters & Harrison, the drawers, declared that it was inconvenient for them to pay it, and offered a new note in renewal of it, also at 4 months. This new note was then taken by the plaintiffs, who deducted from the face of it 23 dollars and 92 cents, for the interest, and then gave their check upon the bank for the balance, with which Peters & Harrison went to the bank and took up the old note. He further said, that the last note was renewed in like manner, for Peters & Harrison, at the expiration of every 4 months,

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until the note in question in this cause, which was received by the company from Peters & Harrison, in renewal of a note for the same amount ; and that after deducting 23 dollars and 92 cents, for interest, a check was given to them for the balance, to enable them to take up the former note, and the new note was retained by the plaintiffs.

Upon this testimony, the jury found a verdict for the plaintiffs, for 1156 dollars and 71 cents damages, and 6 cents costs, subject to the opinion of the Supreme Court upon the case.

The cause was argued at May term, 1823, by *D. B. Ogden & S. Jones*, for the plaintiffs, and (the late) *J. Wells & T. A. Emmet*, for the defendant.

(a) Laws. sess
41, ch. 16.

Ogden, for the plaintiffs. 1. The original note was not drawn for the purpose of being discounted, but in payment of a debt due to the company, who, I admit, had no power to discount notes by the act of incorporation. But they have, like any other individual, the right to receive notes in payment or security of debts, and in such case to deduct the usual discount. By the act of 1818,(a) the original company were dissolved, and a new one created, who were constituted trustees to collect the debts of the old company, among which this was one ; and had not these trustees a right, in discharging this duty, to take security and extend the credit, deducting the discount ? The 3d section declares that they may do all matters and things relating to the objects for which they were instituted.

(b) 15 John.
358.

(c) 19 Id. 1.

They are found, by this act, with a note in their hands belonging to their *cestuy que trusts*. Being applied to for an extension of credit, they accede to the proposition, and, as payment, take another note at 4 months, deducting the usual discount. This was not discounting by way of business, but was collateral or incidental to the note which the company had before taken in the lawful and regular line of their employment. *The People v. The Utica Insurance Company*,(b) and *The Utica Insurance Company v. Scott*,(c) do not, therefore, apply. In the first it was decided, on information in nature of a *quo warranto*, that they had no power to carry on

discounting as matter of business, and in the second they failed in an attempt to enforce a note which had been taken in the course of their unauthorized banking operations. These cases were founded on the restraining act, *d*) which was levelled against the exercise of banking powers. The 2d section (which he read) speaks of "any association, &c., for the purpose of issuing notes, receiving deposits, making discounts, or transacting any other business which incorporated banks may or do transact by virtue of their respective acts of incorporation." This is not the case of the plaintiffs. The act is cautiously worded, and the legislature never intended any restraint beyond what they clearly and fully expressed. The construction contended for would restrain every commercial house in the city of New York, consisting of more than one member, from securing their debts by discounting notes offered in security. We rely on the *Utica Insurance Company v. Scott*, as clearly supporting this distinction.

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(d) 2 R. L.
234.

2. Seven per cent. per annum was deducted for the time which the note had to run ; and we shall be told that this was usurious. If so, it was either because the interest was deducted beforehand, or three days too much were included in the computation. *The President and Directors of the Manhattan Company v. Osgood*, *(e)* answers the first objection, unless there is a distinction between bankers and others. The principle is the same as to all. The statute of usury does not mean one thing as to merchants, and another as to bankers ; and this Court will not listen to evidence of custom in order to sanction usury.

(e) 15 John
162, 168.

As to the second objection, if any, in fact, it arises from a mere mistake in the amount of time. Both parties intended 7 per cent. The calculation proceeded by aliquot parts of the year ; and the error intervened by treating three days as the 10th of a month, by which about three-fourths of a cent was lost to the debtor ; and if there ever was a case in which the maxim *de minimis non curat lex* applied, it does so here. A mere mistake in calculation was never holden to be usury. There must be a corrupt agreement.

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But here is no mistake. The statute speaks of years, &c., and the uniform custom has been to compute days as the 30th part of a month. This is for the convenience of commercial business.

J. Wells, contra. 1. Independent of the restraining act, these plaintiffs had no power to become parties to the note. They are a body corporate; and have no rights except what are specifically conferred by statute—not like physical and moral agents, capable of performing every thing except what is denied to them by prohibitory laws. They are the creature of the legislature, who have delegated to them an authority which, when they transcend, their acts are not merely unauthorized as to them, and valid as to others, but illegal and void to every intent and purpose. The object of their creation appears by the act, (sess. 33, ch. 20, March 21, 1810.) It is insurance, and nothing more. Indeed, it is admitted, that they have no power to employ funds in discounting notes, as the business of the institution; but we deny the qualification contended for. It makes no difference what their notions may be, or the purpose for which they are associated; nor whether they depart from their powers generally, or only in particular instances. Here is no latitude for a constructive extension of powers. “An incorporated company have no rights except such as are specifically granted, and those that are necessary to carry into effect the powers so granted.” (f) The power of discounting is not necessary to carry their powers into effect. They may receive notes for premiums; because this is in the course of their business; but the right to make these notes the basis of a long course of speculation, by way of discount, is not incidental, because it is wholly unnecessary. No matter, therefore, what may be the origin of the debt due; it is plain, from the case, that the note in question was offered for the purpose of *discount*, and accepted in this view. The manifest operation is a *discount* for prompt payment. It is the same thing precisely as if money had been paid *minus*, the discount, thus indirectly converting their money into a fund for the purpose of a speculation, which the law had prohibited as to them. To mark the transaction still stronger, after

(f) 15 John.
383, per
Thompson, C.
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paying the antecedent debt, the balance is advanced in money. To have saved appearances entirely, the note should have been for the precise debt. The balance, at least, was a mere loan. This operation is carried on from the 30th of August, 1817, to the 11th of January, 1819, and assumes the complete character of a discount transaction. The only excuse is, that the drawers were all along unable to pay. But this is a mere pretence, unsupported by proof.

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Again: suppose the old company had this power of incidental discount; and that they might have kept this note on foot by these renewals from time to time; the new company had no such authority. The corporation was kept alive by the act of February, 1818, for the mere purposes of collecting in the debts and closing the concerns of the old company. Had there been a single act of enlargement by the old company, it might have been valid; but even this power is divested by the late act. It is the duty of the new company not to give time, but collect in the most speedy manner. This question upon the powers of corporations to go beyond the purposes of their creation in issuing notes, &c., has been much examined in two late English cases—*Broughton and others v. The Company, &c. of the Manchester and Salford Water Works*, (g) in the King's Bench, and *Slark v. High-Gate Arch Way Company*, (h) in the Common Pleas. The defendants in each, a corporation for specific purposes, had accepted bills of exchange, and the question was upon their power to do this, and if they had power, whether the bills were not void by the English restraining act, made in protection of the Bank of England. In the first case, two of the Judges adverted distinctly to the powers of the corporation, and held the bill void, because it was foreign to the purposes for which the company was created, (and he read from their opinions on this point, 1 B. & A. 8, per Bayley, J. and id. 11, per Best, J.)

(g) 3 B. &
A. 1.
(h) 5 Taunt
792.

[WOODWORTH, J. I do not understand the plaintiffs' counsel as contending for the general power of discount. Most clearly that cannot be sustained.]

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Wells. The case of the *Utica Insurance Company v. Scott*, was a much stronger case for the plaintiffs than the present. What possible difference is there from a mere bank discount? In substance it will be found the same.

2. The note is void within the restraining act. This position was also examined in the *Utica Insurance Company v. Scott*. There, as here, the funds of the company were applied to the discount of notes. The argument on the other side would authorize any and every corporate body to discount, without regard to the original object of the institution. It is not necessary, in order to bring them within the operation of the restraining statute, that the company should issue bills. The act is in the alternative. They are not to associate for the purpose of *issuing notes or receiving deposits, or making discounts*. The going contrary to either alternative will work the same effect as a total violation. The object was to prevent the use of moneyed capital, in all the various modes which the banks had adopted. Nothing short of this could completely protect the charters of these companies, many of whom had paid heavy considerations for their franchise. Here, we find money employed in one of the essential operations of banking.

Nor would the action lie upon the money counts, as was hinted in the *Utica Insurance Company v. Scott*. It is brought against the endorser.

Our reasoning will not, as supposed, operate in restraint of individuals, though carried on openly and avowedly.⁽ⁱ⁾

(i) *Bristol v. Barker*, 14 John. Rep. 205.

T. A. Emmet, (same side.) The intention of the restraining statute is to deny all excuse for discounting, whether generally or in particular instances, and does not apply itself to the intent with which the act is done. If the company discount at all, they have a *fund* for the purpose, within the 2d section. Otherwise, what number of discounts shall settle the point—ten, twenty, thirty, or what other number? The intention is to restrain banking operations to bodies incorporated for that purpose; and no shift or evasion should be re-

ceived to justify an act of violation, however innocent the intention.

But this transaction was not a mere extension of credit. The note is entirely distinct, and disconnected with the premium consideration. The parties are different—the amount more. It is not the continuation of a debt. The original premium note is set off, and the balance paid, thus performing a distinct banking operation, and usurping the franchise of incorporated companies. This is not an incidental power; for if so, why does the 3d section of the act of 1818, prescribe the mode of taking security? It is to be by bottomry, respondentia, or mortgage of real estate or chattels real, &c.—not by notes or bills. Were not the powers to loan on mortgage equally incidental? It is plain, therefore, that an incorporated company has not the same powers, even in relation to securing debts, as an individual. This was ruled in the *Utica Insurance Company v. Scott* and is abundantly settled in the English cases cited by my associate. A corporation have a right to sue, and to secure their debts in the particular manner pointed out by the act, but in no other. They cannot, even in this respect, exercise under their general powers the same rights as a natural person.

Here are several acts of discounting. For the purpose of deposits, they use another bank, on which a check is given, in order to pay the balance. They thus derive all the substantial benefits of deposit as well as discount. Had the old company pursued this course, would it not have been pronounced a plain evasion of the law? Would they have been allowed to call it a benevolent extension of credit to an individual, or for the plain purpose of profit to themselves? We have seen that the plaintiffs are still farther restrained. They are made trustees, and are limited to a discharge of their trusts in a particular manner, and are restrained in terms, by the 3d section, from the exercise of banking powers. In discounting, therefore, they have not only violated their duty as trustees, but transcended their powers as corporators.

S. Jones, in reply. I shall void a discussion of the powers of this corporation, so much talked of on the other side,

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to carry on the business of discount, because they can have no application to the case. The corporation not only ceased to exist a number of years since, but here was no act resembling a discount, properly so called. Two debts were due on notes, to the old company, for premiums of insurance. Butler was also indebted to the plaintiffs in another sum of about 400 dollars, which, by legal intendment, was properly contracted. The notes lay over and were past due. The debtors applied to the plaintiffs and offered a note of \$1000, covering all the demands, and asked them to take it, and pay back the balance: they comply, and this latter act is relied on as vitiating the transaction. But what were they to do? The debts are bad; the original notes are protested; there is no previous agreement that the \$1000 note should be procured in the market for the purpose of discount. A rejection might have resulted in a loss of the debts. The witness' calling this transaction a discount, does not make it so. The note was taken expressly in payment, and to condemn it on this ground, would be a sacrifice of sense to sound. The note was continued down in the same way, by the trustees, under the new act. The argument on the other side presupposes a state of facts and a course of conduct which does not exist. If the origin of the debt was fair, and the note valid, could not the trustees receive payment, or, what is the same thing, a new note as a substitute? The original note being due, in conscience, if paid, could never be recovered back, and it is conceded to us, that the original debt may be due, though it is contended that the note is void and the endorser not liable.

It is said that a corporation can exercise no powers, except those expressly delegated or necessarily incidental: Granted. Here is an insurance company having funds. Now is there no way of employing these funds, by investing and making them yield a profit? and as incidental to that right, may they not be invested in any way not prohibited by the statute? It does not follow, that because the statute authorizes an investment in mortgages, respondentia bonds, stock, &c., that this delegation of power precludes the exercise of all others. This clause is in the shape of a limita-

tion ; not for the purpose of conferring power. Without it, the company might have swelled their real estate to a dangerous extent. Accordingly, the 3d section goes on conferring certain rights, but provides, in the last clause, that the company shall not exercise banking powers. These clauses imply, that without the specific restriction, their rights would have been much more extensive. Suppose, then, the company, instead of taking mortgages, had invested all their funds in notes, renewing them from time to time, as they have done here ; would this have been to violate the object of the institution ? The securities should be such as to enable the company often and suddenly to command their funds. They are liable to great and unexpected losses. Such a company ought always to have their funds forthcoming at three or four months ; and there is no way so effectual for this purpose, as an investment in notes, which always rank next to money. This transaction was a mere continuance of such an investment. Besides, the principle contended for on the other side, would drive the company to a course of prosecutions and judgments, instead of taking securities, unless the power to secure their debts should be expressly conferred by the charter of incorporation. Such a clause was, I believe, never thought of,

As to the language of the restraining act ; when we define general terms used in a statute, we must be careful not to make our definition too extensive. That of *banking powers*, used in this statute, if we take the definition of the other side, would restrain discounting and lending money on notes, in all cases, as well in respect to individuals as corporations. The statute avoids all promissory notes issued contrary to its provisions, but it never was intended to restrain individuals from issuing them. The real question is whether this be a continued employment ; whether it be one regular branch of business with individuals or corporations. It is this alone, which the statute was intended to reach. They must employ the fund mentioned by the statute solely or principally to this purpose, or it is not violated. A single individual was excepted by the act or rather not reached by it ; and this was the ground taken in *Bristol v. Barker*, (14 John. 205,) but after the decision of that case came

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the statute of the 21st of April, 1818, extending the same prohibition of the general restraining act to every individual in the state, whether acting alone or jointly with others. We are then warranted in saying, that the principle contended for, would reach individuals engaged in business. It takes in the whole commercial world. There is hardly a commercial house in the city of New York, which does not perform banking operations, if this may be called so. It is asked where is the limit? I answer, you must show the operation followed up for banking purposes. This is a fact to be proved on the trial. Suppose an action for the penalty imposed by the act for banking: would a single act of discounting, sustain it in evidence? No. The jury could not find the defendant guilty until this should be shown to be his regular business. Indeed, if I understand the cases of The Utica Insurance Company, they are placed on this ground, viz; that they had set themselves up as a banking institution. The plea in the last case sets forth that fact, and had the company been able to traverse this, or that the note was not issued in the course of such a business, they would have recovered. They could not do it, and the plea was holden good. It lies with the party seeking to avoid the note, to show this general object.

Again; the new act impliedly gives power to negotiate in this manner, to the new company. These have a distinct duty to perform as trustees, from that which they have a right to exercise as a company. In relation to these trusts, they act as individuals. Their character, as it stood under the old or new corporation, does not attach to them. Years must elapse before the business of the old company can be finished, and their concerns settled upon open policies and other matters. Must these trustees, during all that time, confine themselves to a dead deposit? Can they not place their funds out at a profit? and this either on bond or note? Nor does it lie with the debtor to object that here is a breach of trust. Such an objection can be made only by the *cestuy que trust* in the event of a loss.

The excess of interest depends merely on the mode of dividing the year into aliquot parts, without any intention of

usury. It is like taking 365 days for a year, when perchance it is leap year, and contains 366 days.

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WOODWORTH, J. It was decided in the case of the *Manhattan Company v. Osgood*, (15 John. 162,) that discounting a note at seven per cent. and taking interest in advance, was not usury.

By the act of incorporation, no power is given to discount notes. It was created for the sole purpose of insurance.

The company have no rights, except such as are specially granted, and those that are necessary to carry into effect the powers so granted. (15 John. 383.)

The act of 27th Feb. 1818, authorizes the directors to close and wind up the business and concerns of the company.

The original note was discounted in 1817, to pay a demand against Ogden & Harrison, and another against Thomas C. Butler ; it exceeded these demands \$20. The excess was paid over to Peters & Harrison, the drawers. I have no doubt that the plaintiffs might lawfully take notes for pre-existing debts for insurance, and renew them, but the charter gave them no right to discount on the funds or moneys in their hands. If the charter does not give them banking powers, so far as they travel out of their grant, they act as a company of private persons, and become a mere association, doing business without any express authority by law. (15 John. 381.)

The restraining act, 2 vol. R. L. 234, applies to an association, institution or company, for the purpose of issuing notes, receiving deposits, making discounts, or transacting any other business, which incorporated banks may do, and declares that all notes given to any such association, institution or company, shall be null and void. It appears to me that this case does not fall within the words or intent of the statute, for there is no evidence that the plaintiffs associated for the purpose of carrying on, or actually transacted any business prohibited by the act, unless the insulated fact of discounting a note, which exceeded the amount of the debt due

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the plaintiffs, \$20, was unlawful. This circumstance I presume was accidental, and most probably has arisen from want of knowledge of the precise sum due for insurance when the note was drawn. The small amount urged as a discount on the funds of the institution, forbids the conclusion, that it was a business transaction of lending and borrowing. The benefit to be derived by either party, was too trifling to suppose for a moment, that the note was intentionally drawn to obtain a discount of \$20. I infer from the facts, that Peters & Harrison, intending to assume the notes held against Ogden & Harrison, and Butler, drew the note in question, for \$1000, about equal to the debt to be assumed; it turned out, on calculation, that they were entitled to the return of a few dollars, which the plaintiffs advanced. The restraining act does not apply to such a case, consequently the note is not void. I am of opinion that the plaintiffs are entitled to judgment.

SUTHERLAND, J. In this case the note is shown to have originated in a debt due to the plaintiffs for premiums of insurance. The case states, that on the 30th August, 1817, the plaintiffs were the holders of certain promissory notes, drawn by Ogden & Harrison, and endorsed by Thomas C. Butler, amounting to about \$500, for premiums of insurance; that, at the same time, Thomas C. Butler was indebted to the plaintiffs in another sum of upwards of \$400; that Butler offered the plaintiffs a note for \$1000, drawn by Peters & Harrison, for discount, the proceeds to be applied to be applied to the note of Ogden & Harrison, and the debt of Thomas C. Butler. It was discounted, the proceeds so applied, and the balance, about \$20, paid to Butler. The note on which the suit is brought, is a continuation of the note drawn by Peters & Harrison. It is not expressly stated in the case, that Butler's debt was for premiums due to the company; but from the manner in which it is stated, it may be fairly inferred. In the absence of all proof to the contrary, we should intend that it was a debt of that description. The plaintiffs had a right to give credit for their premiums; and to continue the credit by a renewal or discount of notes.

The parties to the notes being changed on some of the renewals, does not alter the character of the transaction. It was still a debt due for premiums.

Nor does the fact, that the note first discounted exceeded the debt due to the company to a small amount, and that the excess was paid to Butler, vary the case. It was evidently the intention of the parties that the note should be for the amount due only ; but upon stating the account, and casting the interest, there was found to be a trifling difference of \$20. This fact will not warrant the inference, that the object of the parties was a loan, and not an extension of credit upon a pre-existing debt.

The discounting of the note in question was not affected by the restraining act ;(j) nor was the taking the interest in advance usurious.

The note in this case was payable in *four months*. The question which was discussed in the case of these plaintiffs, against Ely & Parsons,(k) as to the principle upon which the interest ought to be calculated, cannot arise here, except in relation to the days of grace ; and there being no evidence in the case to show upon what principle the interest was calculated, even if there should appear to be a trifling excess, we are authorized, and, I think, bound to presume, that the error was the result of mistake, and not the adoption of an erroneous principle of calculation.

I am, therefore, of opinion, that in this case the plaintiffs are entitled to judgment.

SAVAGE, Ch. J. concurred.

Judgment for the plaintiff

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(j) Vid. the
opinion of
Sutherland, J
upon this
point, in the
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(k) The next
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ELY & PARSONS.

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and forbidden to carry on any other trade or business, also forbidden to exercise banking powers, with a clause in the act incorporating them, enumerating the kind of securities upon which they may loan moneys, but not including promissory notes in such enumeration, have no power to loan moneys upon promissory notes, or on any securities other than those specially enumerated.

The New York Firemen Insurance Company had no power to loan money on note or other personal security, under their act of incorporation of 1810; nor have the same company this power under their act of incorporation of 1818.

Notes taken by either of these companies, upon a loan of their moneys, are therefore, void.

Neither had power, by their act of incorporation, to discount notes.

Whether, if they had this power by their act of incorporation, it was taken away by the general restraining acts forbidding to associations, or individuals, the exercise of banking powers, &c.? *Quære.*

Whether, where one corporation is appointed by statute to settle the concerns of another and former corporation, which is dissolved, the latter is prohibited, by the restraining acts, from employing the funds of the former in discounting notes? *Quære.* (Vid. Laws, sess. 38, ch. 116, sess. 41, ch. 16, sess. 27, ch. 117, sess. 27, ch. 110, s. 8, 9, 2 R. L. 234.)

Opinion of Sutherland, J. that to bring a corporation within the restraining act, their funds should be devoted principally to the business of banking; and that a single act of loaning money on bank discount of a promissory note, followed by several successive renewals of that note, on the same discount, would not be sufficient evidence to show that a corporation had violated the restraining statute.

Opinion of Savage, Ch. Justice, that the latter would be a violation of the restraining statute.

A corporation is a mere political institution, a creature of the legislature, having no other powers than what are given to it by its creator, or such as are incidental or necessary to carry into effect the purposes for which it was established.

Definition of the terms, "*banking powers.*"

Casting interest, upon the principle, that 30 days are the 12th of a year, 60 days the 6th, 90 days the fourth of a year, and the three days of grace the tenth of a month, and discounting a note upon such a calculation, is usurious; and the note, consequently, void.

The right to take interest in advance on discounting a note, is not confined to banks, bankers, and merchants discounting bills in the fair course of commercial business, but extends to individuals, and others having a general right to discount.

The rule is this: Taking interest in advance is allowed for the benefit of trade; though it exceed the legal rate of interest. The instrument thus discounted, must be such as will and usually does, circulate in the course of trade, viz a negotiable instrument, and payable at no very distant day. Under this restriction, taking interest in advance, either by a bank, an incorporated company without banking powers, or an individual, is not usurious.

A usage among banks to cast interest at a year for 360 days; one-half of a year for 180 days; one-quarter of a year for 90 days; one-sixth of a year for 60 days; and the three days of grace at one-tenth of a month, would not prevent its being usurious, though such usage were universal.

The legal year is 365 days; the legal half-year 182 days, and the legal quarter 91 days, the law paying no regard to the odd hours.

A statute cannot be abrogated or controlled by the custom or usage of a particular trade.

the defendants, and endorsed by them and Bennet, Cady & Co. The note was dated 6th July, 1819, payable ninety days after date, for 3450 dollars. The cause was tried before his honor, (the late) Chief Justice Spencer, at the sittings in New York, the 15th June, 1821.

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William M'Neil, a witness for the plaintiffs, proved the hand-writing of the drawers and of both the endorers, and also that there had been a payment on the note of 500 dollars, and that the amount which would be due on the 9th of August, (then) next, would be 3330 dollars 96 cents. The protest and regular notice of non-payment to the defendants being admitted, the plaintiffs read the note, and rested.

William M'Neil being cross-examined by the counsel for the defendants, further testified, that he was now, and had been since the year 1810, secretary of the company; that the plaintiffs received the note in question, from Sturges & Sherman, on the 30th of July, 1819, in part payment for two notes held by the plaintiffs, which had lain over, and were protested for non-payment, one drawn by Sturges & Sherman, in favor of, and endorsed by Ely & Parsons for 2250 dollars, at three months, dated 27th March, 1819, and payable on the 30th of June following; the other drawn by Josiah Sturges, in favor of, and endorsed by Ely & Parsons, for 1600 dollars, at three months, dated 3d April, 1819, and payable on the 6th of July following; the two notes amounting together to the sum of 3850 dollars; and that for the balance, viz. 400 dollars, they received Ely & Parsons' note, in favor of Sturges & Sherman, dated 6th July, at sixty days; that interest at the rate of seven per cent. per annum, was calculated on the two notes, which had lain over protested,

To constitute usury, there must be a corrupt agreement.

Payment, and receipt of usurious interest is, *prima facie*, evidence of a corrupt agreement.

This may be repelled by showing that it was by mistake.

Examples of mistake; miscalculation; miscount of money, &c.

But the adoption of an erroneous principle of calculation, which gives more than 7 per cent. per annum, and receiving the discount or interest, according to that principle, is usury, though the lender believe that he has a legal right to do so.

The former is a mistake of the fact; the latter of the law.

An agreement to pay more than legal interest, through ignorance of the law, is void.

Whether there be a corrupt agreement, so as to constitute usury, is a question of fact; but where the facts are proved beyond dispute, the law fixes the intent.

This distinction considered and illustrated.

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up to the time when the new notes would become due, which interest was *seventy-two dollars and twenty-three cents*, and was paid, in cash, at the time of taking the new notes ; that the plaintiffs accepted the new notes in lieu of the protested ones, and gave them up. The witness further testified, that he was in the habit of calculating interest in the following manner, viz. to consider 30 days as the 12th part of a year, 60 days as the 6th, and 90 days as the fourth of a year, to charge $\frac{1}{2}$ per cent. for 30 days, 1 per cent. for 60 days, and $1\frac{1}{2}$ per cent. for 90 days, and to add to the product in each case, $\frac{1}{3}$ to make 7 per cent. ; that the 3 days of grace were calculated in the same ratio, that is to say, $\frac{1}{12}$ part of the amount for 30 days ; that the company had never given him orders to make his calculations in that way ; but it was his usual mode of calculating, and known to be so by the company, and he believed it to be the usual course in other companies, and the common mercantile practice.

The counsel for the defendants then stated to the Court, that they wished to trace the origin of the notes before described, and for which the note in this suit was given, that is to say the notes for 2250 dollars and 1600 dollars, and for that purpose asked the witness what those notes were given for ? The witness replied, that the note for 2250 dollars was given in part payment of a note of Sturges & Sherman, in favor of Ely & Parsons, for 2500 dollars, dated 24th December, 1818, at three months, which had been discounted by the office, at 7 per cent. ; that the discount paid was 45 dollars and 21 cents ; that this was the first time they had Ely & Parsons' name ; that the note for 2500 dollars was given in part payment of Josiah Sturges' note in favor of and endorsed by Smith and Hubbell, for 3000 dollars, dated 22d September, 1818, at 90 days ; that the discount on this note was 54 dollars and 25 cents ; that he could not continue the chain of this note any farther back. Being questioned as to the note for 1600 dollars, he replied that it was given for, and discounted, to take up a note of Josiah Sturges, in favor of and endorsed by Ely & Parsons, for 1800 dollars, dated 31st December, 1818, at 90 days ; that he considered it a renewal ; that the note for 1600 dollars was dated

3d April, 1819, payable at 3 months; that the discount taken was 28 dollars and 94 cents; that the note for 1800 dollars was discounted, and the discount taken was 32 dollars and 55 cents, and was given in renewal of a note of Josiah Sturges, for 2000 dollars, dated 30th September, 1818, at 90 days, which was also discounted, and the discount was 36 dollars and 17 cents for 93 days. The \$2000 note was discounted, and was given for one of the same amount, drawn by Josiah Sturges, dated 27th May, 1818, at 4 months; that the discount on this note was 47 dollars and 84 cents for 4 months and 3 days; that the last mentioned note was discounted and given in renewal of one for the same amount, by the same drawer, dated 24th January, 1818, also at 4 months, on which the discount for 4 months and 3 days was 47 dollars and 83 cents, and this last note was a renewal of another discounted note of the same amount, given by the same drawer, dated 22d September, 1817, also at 4 months, on which the discount was 47 dollars and 84 cents for 4 months and 3 days. The witness also said, that the origin of both the notes, for 2250 dollars and 1600 dollars, was a lending of money by the company to Sturges & Sherman, whose notes were discounted for the purpose, and continued by renewals, down to the one on which this suit is brought; and that the money for which those two notes were given belonged to the old company, and that an account for the concerns of the old company was kept in the Bank of America, separate and distinct from the new. The witness, being again examined on the part of the plaintiffs, stated in further explanation of the mode by which the interest was calculated, that when a note was payable in months, it was calculated the same way, 2 months making $\frac{1}{6}$ of a year, 3 months $\frac{1}{4}$ of a year, and considering 30 days as one month; that if any error was made in calculation, it was always corrected in his book. The witness again stated, that the mode detailed was the common mercantile mode of calculating interest, and the same pursued in all the banks; but this evidence, as to the common usage and practice of banks, was objected to, and received subject to the objection.

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Upon this testimony, the jury, under the direction of the late Chief Justice, found a verdict for the plaintiffs, for 3330 dollars, and 96 cents damages, and 6 cents costs, subject to the opinion of the Supreme Court on a case to be made, with leave to either party to turn it into a special verdict or bill of exceptions.

The cause was argued at the May term, 1823, by *D. B. Ogden & S. Jones*, for the plaintiffs, and (the late) *J. Wells & T. A. Emmet*, for the defendants.

D. B. Ogden, for the plaintiffs. The act of discounting is no more than a loan of money on interest, which is paid in advance, so that the real question is, whether the company have the power to lend money, and take a note in security. Perhaps they have no right to buy notes created for the purposes of discount; but the power to loan on note is implied by the act creating the corporation, as being necessary to carry its object into effect. True, the sole object of the company is to insure. This is declared by the first section of the act, but the manner of doing this is found in other sections. Even if the act had stopped at the first section, premium notes might have been taken on interest, payable at a future time, and the interest might have been taken in advance upon the same principle. By the 5th section, the company are empowered to secure debts, *due in any manner whatever*, by mortgage, which plainly implies that they are not confined to premium debts. If they may have debts, then why not as well on promissory notes as otherwise? The opinion of this Court, in *The People v. The Utica Insurance Company*,^(a) was, that the surplus funds of the company might be loaned at interest. Ch. Justice Thompson,^(b) says there is no doubt of this; and he gives a construction to the act, creating that company directly applicable here. "The second section of the act, (says the Ch. Justice),^(c) prohibits the loaning for certain specified purposes, but the loaning for any other purpose, and in any other way not prohibited by law, is authorized and included in the general power to invest the surplus capital; and under the 12th section they have a right to take and hold mortga

(a) 15 John.
358
(b) Id. 384.

(c) Id. 384,
385.

ges to secure such loans ; for this section expressly declares, that they shall have the right so to do, to secure the payment of any debt which may become due to the corporation, by any means whatsoever. A bond or note given to the corporation, on a loan of money, creates a debt due to them, and the payment may be secured by mortgage, by the express authority here conferred." *Broughton v. The Salford Water Works*,^(d) was cited against us in the last cause. That was not an action by, but against a corporation. Their counsel contended that they were not bound, because a corporation can be holden by no contract not under their corporate seal. This question was not passed upon by the Court, but is now definitively settled in this state,^(e) against the position of the counsel. They next contended that the acceptance was void, as being contrary to several acts of parliament, made for the protection of the Bank of England, by whose charter all other corporations are forbidden to loan on bills at less than 6 months ; and it was on the latter ground that a majority of the Judges decided in favor of the defendants. But we have no statute prohibiting loans by a corporation.

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^(d) 3 B. &
A. 1.

^(e) *Munn v.*
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sion Company
15 John. 44.

Suppose the company have violated their charter by taking the note. Though this may be void, yet we may recover for the money lent, as was holden by this Court in the *Utica Insurance Company v. Scott*.^(f) By the restraining act, considered in that case, the note may be void, and the state may claim a forfeiture of the charter, but the defendants cannot object to paying the consideration.

^(f) 19 John.
Rep. 1.

Again : by the new act,^(g) the old company are gone, for all purposes of insuring. The directors of the new company are, therefore, mere trustees to settle and collect the debts due to the former. Like all other trustees, their powers are unlimited in their nature, and restrained by no statute. In this point of view, the question depends merely upon the general power of trustees over the concerns of their *cestuy que trusts*. Trustees, doubtless, have power, indeed it is their duty to take security for bad debts, by promissory note or otherwise. Their funds must be multiplied. Here are losses, from the nature of the business ; suits are pending, and heavy expenses to be incurred ; and it was their plain duty so

^(g) *Sec. 41*
ch. 16.

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(h), 2 R. L.
234. 4 Laws,
242, c. sec.
41, ch. 236.

to invest their funds as to produce interest. They might, then, loan on interest, upon promissory notes, at a credit, or in a word, "discount notes." Suppose they have broken their trust, this is a question only between them and their *cestuy que trusts*. Such an objection does not lie in the mouth of the defendants.

Again: what was the object of the restraining statutes? (h) To prevent associations being formed wholly or principally for banking business—not to prevent other companies from doing any particular act which a bank does. Banks lend money. Does this, therefore, restrain all other persons from lending? The statutes were levelled against the issuing bank notes merely—not the occasional giving or discounting notes. The latter is not the principal business of a bank. A great share of their business is in receiving deposits. It should, therefore, have been left to the jury, as a question of fact, to say whether here was or was not a violation of the restraining statutes.

(i) The
next preceding
cause.

J. Wells, contra. I shall take but little additional notice of the question examined by the gentleman, beyond what I said upon the same subject, in the cause of these plaintiffs against *Sturges*. (i) It does not follow, that because this company may, by the act, lend on bond, that they may do the same thing upon note. So says the case of the *Utica Insurance Company v. Scott*, upon which the gentleman relies. Indeed, the admission that they cannot buy up notes in the market, amounts to the same thing. A discount is but a purchase to every substantial purpose. A. B. who makes a note for the purpose of its being discounted by the company, is bound; but A. B. who sells and indorses the note of a third person to them, is not bound: there is nothing in such a distinction. I do not understand how this company had the right of lending money at all. Certainly not because the *Utica Insurance Company* had this right. They had an express authority to do this by their charter. Here is no such authority. All the powers of this company are express and exclusive. The disposal of their surplus funds is directed, and the manner expressly circumscribed; and we must not be understood to admit that they can loan

even upon bond. The power of taking notes for premiums is necessary to effect that of insurance; but the power to discount does not follow, unless we admit the absurdity, that a company may discount its own notes. The 6th section of the old act points out the cases in which they may take bonds and mortgages to secure their debts, so necessary did the legislature deem it to restrain them even in this particular, which evidently relates merely to debts due for stock or insurance. As to the words, *by any means whatsoever*, they are only co-extensive with the powers before given. They are general words, and never could have been intended to enlarge the authority already specifically granted. Such a construction would authorize all or any means of creating debts; whereas the clause must be taken in reference to the subject matter, and intends lawful means only.

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In arguing the case of this company against Sturges, I cited *Broughton v. The Salford Water Works*, in order to show the opinions of two Judges on the subject of corporate powers; not to determine the effect of the restraining act. If they were not, because a corporation, liable on a bill, as acceptors, does it not follow, that they could not claim on a bill of which they were payees or endorsers? They have no power to take such a bill; and it is, to them, therefore, a prohibited traffic.

It is said the plaintiffs are general trustees, but they still remain a corporation for every purpose except that of insurance. This will appear, not only from the acts themselves, but from the transactions of the company, appearing in the case. If they are not a corporation, it furnishes us with another defence in this case. They have no right to the character which they assume, and could not come here as plaintiffs.

As to one of the notes included in the plaintiff's claim, it was, in its origin, a mere loan of money, on a note discounted several months after the old company had ceased to exist. Another had its origin in the same manner, a short time before that event. Now the original law pointed out what was to be done with the surplus funds. They were to be invested in stock. Then these notes are void, inde-

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pendent of the restraining act. Under this act it is equally void, though not declared so in terms ; for it is the offspring of a transaction positively inhibited by that statute, and is tainted with the original illegality.

The note is usurious upon two grounds : 1. From the manner in which the interest or discount was calculated. 2. From the circumstance of this being taken in advance.

64 (j) 1 R. L. 1. The note in question is at 90 days, which is called one fourth of a year ; the three days of grace being called one tenth of a month. The statute(j) provides, that no person shall take directly or indirectly, for loan of any moneys, above the value of 7 pounds for the forbearance of 100 pounds, for one year ; and so after that rate, for a greater or less sum, or for a longer or shorter time. If money be lent for a year, 7 per cent, only is allowed ; if for 6 months, at the same rate ; if for one quarter of a year, the same. But is 90 days a quarter of a year ? It is so only on the principle with which the plaintiffs set out, that 30 days make a month. By what rule of law is this ? We have lunar and calendar months ; the one 28, the other, a different number of days. If 30 days be the twelfth of a year, then 12 times 30 days are the year ; if not to any other intent, yet the laws of nature and of man must bend to the purposes of the money lender. No doubt this practice originated with the banks, and was, with many of them, perfectly innocent ; interest being at 7, and discounts at 6 per cent. This can afford no authority for continuing the practice among lenders, with whom both are at 7 per cent. The 3d Dyer, 345, a, pl. 5,(1) tells us, that the legal year is 365 days ; the half year,

(1) A question was moved in the bench upon a condition of re-entry, for non-payment of rent due at Michaelmas, or by the space of a quarter of a year after, what shall be accounted a quarter of a year ? and by the opinion of the Court, the fourth part of the days of a year, which are 91 days, make a quarter, and to the 6 hours over, the law pays no regard. And Bendlowes showed an extract from an old book of the exchequer, to this end : a. Note, that every quarter of a year contains in it ninety and one days, which make thirteen weeks ; and half a year contains 182 days, but the year 365 days, and 52 weeks : the quarter of the year after the feast of Michaelmas, begins on the 30th day of September, and ends on the 29th day of December ; the next quarter begins on the 30th of December, and ends on the last day

192, and the legal quarter, 91 days. This note, payable at months, hangs on the same principle, as well as the three days of grace, which were called the 10th of a month. The plaintiffs may here again claim the benefit of the maxim *de minimis non curat lex*, in protection of their rights, but the avidity with which a half cent is watched and pocketed by them, shows no want of care on their part.

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It will be said the intent was not corrupt; but the intent is matter of legal inference, when once the fact is found. There can be no doubt that the company intended to take the interest of one-fourth of a year, for 90 days. Even in a special verdict, it is enough that it find the facts, without saying *corrupte agreeatum*; (k) and in every case of mistake which has arisen under the statute, the Court put it upon the ground, that if the party taking the excess know of the mistake, the legal consequence of usury would follow. This was the opinion of Eyre, J. in *Hammet v. Yea*, (l) who begins his opinion by saying in so many words, "Where a party on a contract for a loan intentionally takes more than £5 per cent. per annum, for forbearance of that loan, he is guilty of usury." And in *Marsh v. Martindale*, (m) Alvanley, C. J. says, "I stated to the jury that if a man agree to take more than 5 per cent. for the forbearance of money, the law declares that such an agreement is corrupt within the statute of Anne, whether the party thought, at the time that he was acting contrary to the statute or not." The *Maine Bank v. Butts*, (n) bears a strong resemblance to the one before the Court. The notes of that bank being at 63 days, would be payable at the end of the ninth week; but they were in the habit of receiving renewed notes the week before, charging interest for 9 weeks; thus allowing, in fact, only 8 weeks. Though this was merely for the convenience of calculation, and the bank had no intention to violate the law, yet when the question came up, the Supreme Court of Massachusetts declared the practice usurious. Sewall, J.

(k) *Roberts v. Trenayne*,
Cro. Jac. 507,
8.

(l) 1 B. &
P. 144.

(m) 3 B. &
P. 154, 159.

(n) 9 Mass
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of March; the third begins on the first day of April, and ends on the last day of June; and the fourth begins on the first day of July, and ends on the 29th of September; from which the verses,

*Ter centum, ter viginti cum quinque diebus
Sex horas neque plus, integer annus habet.*

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who delivered the opinion of the Court, concludes in this manner: "It is probable, that in this case there was no intentional deviation on the part of the bank; but a mistake of their right. This, however, is a consideration which must not influence our decision. The mistake was not involuntary, as a miscalculation might be considered, where an intention of conforming to the legal rule of interest was proved; but a voluntary departure from the rate. An excess of interest was intentionally taken, upon a mistaken supposition, that banks were privileged in this respect to a certain extent. This was, therefore, in the sense of the law, a corrupt agreement; for ignorance of the law will not excuse." This case conforms, not only to the English doctrine, but to good sense. Here the intention to take more than legal interest is obvious, and this is evidence of the corrupt agreement. It amounts to usury in judgment of law. The manner of casting interest, disclosed by the case, is peculiar to this country. In England the rule is the same in all banks, public and private. In the last edition of Chitty on Bills, 608, 609 and 610, the Court will see the English tables of interest for years, months and days, which make a distinction between a note payable at 30, 60 and 90 days, and a note payable at 1, 2 and 3 months. The contrary practice, then must have originated in this country; and we ask whether it is of such an age as to sanction a violation of law? There is no doubt of the intent to swell the amount of interest beyond what is strictly legal, and the Court cannot relieve against a mistake of the law. Some calculations have been made illustrating what has been said upon this point, which I will procure and hand to the Court hereafter.(2)

(2) These were as follows: Statement of the difference between the interest as calculated by the plaintiffs, and as the defendants contend it should have been calculated.

Of the \$2250 note.

1st note—\$3000, dated 22d Sept. 1818, at 90 days.	Interest	Difference
received,		\$54 25
Interest on \$3000 for 1 year, \$210. Now if 365		
days give \$210, what will 93 days give? Ans.	58 50	0 75

But, 2. the bare circumstance of taking interest in advance, is usury *per se*. Interest is due in consideration of forbearance on one hand, and the use of money on the other. When money is borrowed for a year, at 7 per cent. the agreement is, that the lender shall part with his £100, and forbear for the year, and that the borrower shall receive and have the use of it for the same length of time. How is this done by discount? The one who receives it, does this *minus* the interest. The lender parts with no more, and at the end of the year, the former is to pay £100 for £93, and the interest on the latter sum; whereas he ought to pay but £93, and the interest on that. *Barnes v. Worlich*. (o) reported in several different books, (p) establishes the old rule.

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2d note—\$2500, dated 24th Dec. 1818, at 3 mo. Int. rec'd,	45	21	
Interest that should have been received,	45	21	0 00
3d note—\$2250, dated 27th March, 1819, at 3 mo. Int. rec'd,	40	68	
Interest that should have been received,	40	66	0 02
Of the \$1600 note.			
1st note—\$2000, dated 22d Sept. 1817, at 4 mo. Int. rec'd,	47	84	
Interest that should have been received,	47	82	0 02
2d note—\$2000, dated 24th Jan. 1818, at 4 mo. Int. rec'd,	47	83	
Interest that should have been received,	47	82	0 01
3d note—\$2000, dated 27th May, 1818, at 4 mo. Int. rec'd,	47	84	
Interest that should have been received,	47	82	0 02
4th note—\$2000, dated 20th Sept. 1818, at 90 days. Int. rec'd,	36	17	
Interest that should have been received,	35	61	0 56
5th note—\$1800, dated 31st Dec. 1818, at 90 days. Int. rec'd,	32	55	
Interest that should have been received,	32	10	0 45
6th note—\$1600, dated 3d April, 1819, at 3 mo. Int. rec'd,	28	94	
Interest that should have been received,	28	92	0 02
The \$2250 and \$1600 notes combined, and new note taken, dated July 6, 1819, at 90 days, for \$3450.			
Interest received on \$2250, from 30th June to 7th Oct. 1819, 99 days,			
	43	30	
Interest received on \$1600, from 6th July to 7th Oct. 1819, 93 days,			
	28	93	
	<hr/>		72 23
Interest that should have been received on \$2250, 99 days,			
	43	72	
Interest that should have been received on \$1600, 93 days,			
	28	54	
	<hr/>		71 26 0 97
Too much interest received, by			
			<hr/> 02 76

(o) Cro. Jac
25.
(p) Noy, 41,
S. C. by the ti-
tle of *Barnes*
v. Worledge,
Yelv. 31, S. C
Same title as
in Croke
Moor. 644, S
C. by the title
of *Worley*'
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(q) 3 B. &
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The interest was payable half yearly, though the principal was not due till the end of the year. Even this was questioned as usurious by two of the Court; and though the objection was overruled by a majority, yet the book goes on to lay down the distinction applicable here. Popham, Gawdy and Williams, Js. held, that "if he had agreed to take his money for the forbearance instantly, when he lent it, that had made the assurance void; for then he had not lent the entire sum for one year, and the other had not had the use of his money according to the intention of the law. And Williams said, that he knew upon this difference, it had been so resolved of late time; wherefore it was adjudged for the defendant, *quod querens nihil capiat per breve*. Stevens said he was of counsel in one Snow's case, where it was adjudged accordingly." The same rule is recognized by the more modern authorities in England. In *Marsh v. Martindale*, (q) the very question I am discussing arose. The interest had been received in advance, by way of discount; the Court pronounced it usurious, and the bond by which it was secured was declared void. By these cases, the general rule is clearly established, though the Court made an exception in favor of trade. They say, "it certainly has been determined that such a transaction on a bill of exchange, in the way of trade, for the accommodation of the party desirous of raising the money, is not usurious, though more than 5 per cent. be taken upon the money actually advanced. In such cases, the additional sum seems to have been considered in the nature of a compensation for the trouble to which the lender is exposed; and unless that indulgence were allowed, it might not be worth while for any merchant to discount a bill." Such shifts were the Courts driven to, in order to evade the manifest intention of the statute. This case shows no more, however, than that they will seek excuses for commercial paper, discounted in the fair course of trade. But they have never gone beyond this. The Court, by Chief Justice Alvanley, accordingly say in the same case, "If nothing more has been done, than what always has been done by way of accommodation among merchants, the transaction was not usurious; but the rule must be confined strictly to that sort

of transaction ; for if the discount be taken upon money without the negotiation of a bill of exchange, it will amount to usury." Thus the general doctrine is established, with the exception, which is in favor of bills passed in the ordinary course of commercial business ; that when A. has taken a bill payable a number of days hence, and cannot conveniently wait during the period of credit, he may put himself in funds by cashing the bill at an advance discount. Is this that case ? The whole transaction grew out of a lending originally. Does Chief Justice Alvanley mean that parties may create paper with an express view to a loan, and thus evade the statute of usury ? Can so extraordinary a position be imputed to so learned a Judge ? If the paper be created for this purpose, no matter whether it be sealed or not. It is true that in the *Maine Bank v. Butts*,^(r) Sewall, J. hints at an exception in favor of banks, to be derived from what is said in the two cases of *Matthews, q. t. v. Griffiths et al.*^(s) and *Maddock, q. t. v. Hammet et al.*^(t) He evidently means no more ; for although he tells us that individuals have a like authority, yet the two cases to which he refers, relate to English bankers, who hold the same relation to community, as banks with us. He cannot mean that all individuals, corporate and physical, have the right. Such a relaxation of the principle would amount to a rule in itself. It is confined to private bankers or banks. The case of *Auriol v. Thomas*,^(u) comes within the exception in favor of trade. Thus we are furnished with the general rule, and its exceptions in favor of banks, bankers and bills negotiated in the fair course of trade. But the plaintiffs disclaim the power of banks and bankers, and the exercise of that power. Here is no negotiation of a bill of exchange. They then stand on the same footing with every other individual in community. We concede certain exceptions, but the plaintiffs do not come within them. It is singular that Blackstone, Justice, should say in *Lloyd, q. t. v. Williams*, that he could not perceive the difference between taking interest in advance, or at the expiration of the loan. There is a plain, mathematical, substantial difference : he was mistaken, therefore, and his opinion must be put on the

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^(r) 9 Mass
Rep. 54.
^(s) Peak N
P. Rep. 200.
^(t) 7 T. R
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^(u) 2 T R
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(v) 2 T. R.
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(w) *Hammet*
v. *Yea*, 1 B. &
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(x) *Peak*. N.
P. Cas. 200.

(y) 7 T. R.
180.

(z) 15 John.
22.

ground of an exception in favor of bankers. He fears that "every banker in London, who takes five per cent, for discounting bills, would be guilty of usury." *Fiat justitia* is not enough. The practice has, it seems, become so inveterate, that pruning will not answer the purpose. It must be plucked up by the roots. But though this may be inadmissible, surely the Court ought not to extend the exception beyond the fair import of its language. The various modes of evasion, (for they can be called by no other name,) adopted by the English Courts, are sufficiently numerous. One was, to take a commission according to the rule recognized in *Auriol v. Thomas*.(v) It will not do to call it interest; it must be softened by the name of commissions for exchange, trouble and other charges. Another mode was, for a country banker to discount bills of a long date by other bills of his own, on London, at a short date, deducting the interest on the former for the time they had to run. Thus a bill at 30 days is brought for discount, which is taken by the banker in exchange for his own bill on London, at 10 days, deducting the interest on the former, for the whole time it has to run. By this operation, he gains the interest for the 10 days, for the whole time his own bill has to run. This goes upon the ground of accommodation, convenience, trouble and expense of remittance.(w) The very apologies offered by the Court, for these practices, show that the statute is violated. It will be seen by the cases of *Matthews, q. t. v. Griffiths*,(x) and *Maddeck v. Hammet*,(y) that the K. B. have not yet gone quite so far as the C. P.

No doubt the case of the *Manhattan Bank v. Osgood*,(z) will be relied on for the plaintiffs. The answer to that case is first, that no more than the legal per cent. was taken for the discount, but in the present case we have demonstrated that more was taken in point of time. Whatever might have been the fact, in this respect, it was not made a point; nor is it for the plaintiffs on the other ground. It was the case of a banking company, and comes within the exceptions established in favor of banks, whose operations are confessedly privileged. The Court put the case on the latter ground. They go upon the English authorities, which treat the case as an exception.

T. A. Emmet, followed the same outline with **Mr. Wells**, supporting the positions he had taken by various additional illustrations, and amplifying and enforcing the arguments of his associate in the able and masterly manner for which he is distinguished. To show that taking interest in advance, or by anticipation is usury, he referred to Comyn's Treatise on the Law of Usury, 91 to 94, as containing a full discussion of this point.

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S. Jones, in reply. This case differs from the former (*the next preceding case*) but in one particular; that is, one of the notes has not, in this case, been traced back to its premium origin in the old company; though it is a matter of fair inference that it originated in the same way with the others. A decision for the defendants would be of most disastrous consequence. The suit is not resisted on the ground of payment, fraud or duress, but mainly that some principle of law has been violated, by a mistake in calculation (for it can amount to nothing else) which in the course of 70 or 80 years, something like two generations, would amount to simple interest.

The first question is as to the power of the trustees to receive the note in question, which is of modern origin, and given 18 months after the old company were dissolved. Whatever want of power was in the old corporation, all defence on that ground is taken away by the new note. The case expressly states that this note belonged to the old stockholders, the *cestuy que trustee* of the fund, which does not all belong to the stockholders of the present company. These trustees have powers in relation to this fund, entirely distinct from the new stock. The last act was passed in order to create this new stock with new stockholders. Their appointment to settle up the concerns of the old company, is like the appointment of commissioners for that purpose. The two duties, and all relating to them, are entirely distinct. This mode of dissolving old, and creating new companies, is not unusual. The act recites that the old company had concluded to wind up their concerns; and then goes on to create a new company with a new stock.

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A part of the old stockholders become so in the new company ; and a number do not. The powers, then, of these trustees for the old company, are not corporate ; nor are they restricted to any particular mode of loaning, or otherwise managing their funds. By the very first section, the *business, concerns and operations* of the old company, *so far as relates to the original stock*, are declared to be *closed and discontinued*. By section 5th, the new directors are to settle up their business and concerns, and distribute their funds ; and they are to have the *charge, management, liquidation and settlement* of the old business. The 6th section does not continue the original powers to the new corporation in their capacity as *trustees* ; but it brings over the original powers as to a *new company*, for the purposes of a business new and distinct from the old. The old funds were not unincumbered and unembarrassed. The contrary was the case, so much so that the legislature foresaw a lapse of years before their concerns could be settled. Indeed, this arises from the very nature of their business. The great bulk of house insurances are made for seven years. The *residue* to be distributed cannot be ascertained till all dues are settled. Hence, they are directed (section 5th) to keep separate accounts ; and the fund must remain under their management for an indefinite period of time. Instead of dividing them therefore, it was their duty to employ their funds till by settling the company concerns, they were prepared to make the contemplated distribution. The stock market is fluctuating. Shall they be bound to investments in this alone ? What hinders their buying a note offered for discount ? Did not the legislature intend to confer this power upon them, as necessarily incident to their authority to settle the old concern in an advantageous manner ? The clause conferring that authority invests them with general powers for the purpose, the same as if three individuals by name had been designated as commissioners, instead of the new corporation. Whenever an act confers power, it confers all the means of carrying it into execution. The general power of contracting and being contracted with, given by the act, confers the right of making all or any contracts whatever, including notes and bills. Suppose the same

power had been conferred upon a single individual, who had taken this note, is there any law which would bear out the defence? If such a note should be lost by bankruptcy, it might then become a question in account with the *cestuy que trust*; but no more could be objected against its collection than if received by an ordinary trustee. Then, whatever might be urged against an insurance corporation, ceases as against these mere trustees. As to one of the notes, the trustees found it in being when they came into existence. It originated in 1817, two years before the note in question. It was a debt due to the old stockholders. Now suppose it to have been illegal in its origin, such a defence has been abandoned by the act of giving a new note. It was due in conscience, and, though void, presents a moral consideration. Suppose a note given to the Utica Insurance Company, for a pre-existing debt due to the company; is there any doubt it would be valid, when thus given to an individual capable of enforcing it?

But I am yet to learn that the old company had no right to lend money upon notes. It is said the sole object of incorporation was insurance. Suppose the fund of the company to be \$500,000. Having this moneyed capital, it is absurd to say they shall not employ it. Really, it is necessary to their very existence. The creation of such a fund of itself, carries the power of loaning, and cannot be restrained short of a most direct and positive prohibition. The creation of such a company authorizes them to invest their funds in such a way as to create a revenue, instead of a dead deposit. Every company having a fund, necessarily possess this power. Could there be any objection to their taking notes at short dates, so as to secure a prompt and regular return of their funds? The provision in relation to stock, is a restricting clause limiting to investments in a particular kind of stock. So of the clause in relation to real estate and mortgages. The latter is a clause which runs through all the chartered institutions of the country, grounded on the same policy as the English *mortmain* acts. This is the first time, I believe, it has been contended that corpo-

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rations cannot vest their funds in *personal securities*, in *chattels* merely, to any extent. The power of taking mortgages is conceded to them. Suppose a note or a bond and mortgage taken for the debt of a stockholder; either would be valid. Premiums to any considerable amount are almost invariably paid by notes; and could they not take a bond and mortgage to secure such a note? What, in either case, would prevent their taking a note, as such security? Or, if a man should offer to pay the money due, and take a loan of it, which amounts to the same thing, would this ceremony of a loan prevent his securing it by note? It is not such a security much the most convenient to them? They want a floating fund. It is necessary to their credit, that this should be on short loans. Is this prohibited? Is it not, on the other hand, allowed upon the conceded ground, that it is necessary to carry the general power into effect?

(a) 4 Wheat.
Rep. 413.

What this necessity is, was fully discussed in *M'Culloch v. The State of Maryland*, (a) by Marshall, C. J. in considering the clause of the federal constitution, declaring Congress possessed of power to pass all laws which shall be necessary and proper for carrying into execution the other powers conferred. "It does not import an absolute physical necessity, so strong that one thing to which another may be termed necessary, cannot exist without that other; but no more than that one thing is convenient or useful to another." In a word, the means which are implied, are all those which will carry the power into effect in the most beneficial manner. What public inconvenience or private injury could result from the exercise of the means now in question?

(b) 38, 39,
ch. 116, s. 3.

In March, 1815, (b) an act was passed, enabling this company to execute policies of insurance, and *other contracts*, without seal. This shows that the legislature understood them to be able to make other contracts. Then, according to the reasoning of the other side from the case of *Broughton v. Salford Water Works*, in B. & A. if they may contract without seal, does it not follow that they may receive contracts without seal?

As to the restraining act, in order to bring a company within its provisions, it must bank. There must be a continued operation, so as to constitute the company a banker. A

few insulated cases of discount or deposit will not do. No bank can live by this. There must be a fund created and devoted to banking purposes. Before the act, every one had a right to bank. The statute is a restraint upon the common law right of the citizen, and should not be carried beyond its plain object. If you depart from this, you will be driven to call every act of discount or deposit an infraction. You would thus invade every counting-house in the city, and the operations of every moneyed man in the community. One friend cannot intrust another with money, for safe keeping, because it is a deposit. By the statute (sess. 27, ch. 110, s. 9) and recital, it will be seen that the chamber of commerce took alarm at the broad terms used in the restraining act; and, on petition, a declaratory act was passed limiting the meaning of the restraining act to banking powers properly so called; or, in other words, to such business only as incorporated banks "usually do or transact." Banking is a continuation of discount and deposit. A single act is not enough, any more than a single act will constitute any other complex idea. Sufficient should have been shown, then, to authorize a jury to find that we were exercising banking powers. This was the very point in the *Utica Insurance Company v. Scott*. The act was levelled at private banks, like that of Mr. Barker. The policy of England is also to prevent private banking by companies; and her statute, (15 Geo. 2, c. 13,) denies a right to more than six persons to unite and take up moneys on their notes at less than six months; yet in *Wigan v. Fowler and six others*,^(c) co-partners who had thus taken up moneys on their note, the very distinction for which I contend was adopted by Lord Ellenborough, who declared that the act however broad in its terms, should be limited to its object, which was to protect the Bank of England. It was, therefore, aimed at private bankers merely; though, if a commercial partnership be made a mere color for raising money by the issue of notes, he agreed that the case would fall within the prohibition of the statute. We deny that here is any proof of our acting colorably as an insurance company, in order to interfere with the banking operations of other companies.

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(c) 1 Star.
Kie's Rep. 459

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(d) 15 John.
162.
(e) 9 Mass.
Rep. 54.

Upon the question of usury, so long as the decision in the *Manhattan Company v. Osgood*, (d) remains unreversed, I shall not raise my voice against it. By that case, the interest may be taken in advance. It is said to decide nothing more than that banks are an exception to the general rule. But the same rule most manifestly applies to every individual, both corporate and natural, as was held in the *Maine Bank v. Butts*. (e) The exception relates to the *paper*, not the *party*. It is the character of the former, not the latter which is to be regarded. The notes or bills discounted being at short dates, the same evil does not arise from it.

Should the date be extended, a great and unusual length of time, the question might then arise, whether it would not be colorable, and intended to evade the statute of usury.

But usury is averred on other grounds. We deny, however, that here was, in fact, any interest taken upon the principle that 60 days is one-sixth of a year, &c., in the manner stated on the other side. One of the notes for which this was given, was not made for discount, and it will be found, on calculation, if I am not mistaken, that no more than strict legal interest was taken on the note immediately in question.

Wells said, though this were so, which is impossible from the calculation, yet if any one of the original notes were usurious, the consideration entering into the present note avoids it. The good notes cannot be severed from the bad ; and he cited *Munn v. The Commission Company*, (f) that the note being made and coming into existence by the act of discount, is void.

(g) 3 Esp. 22.

Emmet cited *Cuthbert v. Haley*, (g) in support of the position laid down by *Wells*, that the present note is void for usury in the original notes.

(h) 9 Mass.
Rep. 45.

Jones said, the good could be separated from the bad note. Suppose two notes, one good and the other usurious ; and you incorporate them both in a new note ; the latter is void only as to the usurious note : and he cited *Bearce v. Barstow*, (h) to show this.

SUTHERLAND, J. The plaintiffs' right of recovery is resisted on three grounds :

1. That the note on which the suit is brought was discounted by the plaintiffs ; that they had no right to discount notes ; and that this note is therefore void.

2. That it was usurious, from the circumstance of the discount, or interest, having been taken in advance.

3. That it was usurious, in consequence of the manner in which the discount, or interest, was calculated.

The discounting of notes is only lending money, and taking notes in payment. Is the power of lending money upon notes either expressly given to this company, or impliedly given from the circumstance of its being necessary to the carrying into effect some power that is expressly given ? If not, the company did not possess the power ; for I hold the rule upon this subject to be correctly stated by Chief Justice Thompson, in *The People v. The Utica Insurance Company*, (15 John. 383,) "that a company incorporated for a specific purpose, have no rights except such as are specially granted, and those that are necessary to carry into effect the powers so granted. Many powers and capacities are tacitly annexed to a corporation duly created, but they are such only as are necessary to carry into effect the purposes for which it was established. The specification of certain powers operates as a restraint to such object only, and is an implied prohibition of the exercise of other and distinct powers." This doctrine is also laid down by Mr. Justice Bayley and Mr. Justice Best, in their opinions in *Broughton v. The Manchester Water Works*, (3 Barn. & Ald. 9, 12.)

It is not pretended that the power of discounting notes is expressly given by the act of incorporation, in this case ; nor is it necessary to the carrying into effect any power that is granted. The 2d section of the act incorporating this company, declares it to be created for the *sole purpose* of insurance, and to have power and authority to make contracts of insurance, &c., for such premium or consideration, and under such modification or restriction as may be agreed on between the parties. It may be conceded that the company have authority to take notes for the premiums due to them,

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instead of demanding cash; because the power of giving credit may be necessary to enable them to make the most advantageous contract of insurance, and because such power is necessarily implied in every authority to contract, where the party making the contract is beneficially interested in it, and does not act in the capacity of agent. The notes thus taken for premiums, might undoubtedly be renewed, and the credit in that way indefinitely extended; but it by no means follows, that because the company may take notes for the premiums due to them that they may loan money on promissory notes. It is not necessary, to enable them to carry into effect any of their powers. If no mode had been pointed out in the act, in which their surplus capital should be invested, it might have been argued with some plausibility, that the power of making such instrument must necessarily belong to every moneyed corporation. It being necessary, to enable them to carry into effect, in the most advantageous manner, their general object, and no particular mode having been designated, they were at liberty to adopt any mode not prohibited by law. The making of loans upon promissory notes, might then, perhaps, have been justifiable, if it was not prohibited by the restraining act. But in this case, the 16th section of the act expressly provides, that it shall be lawful for the corporation to invest *their capital, or any portion of it, either in the stock of the United States, or of the individual states*; thus by the strongest implication, prohibiting any other mode of investment, and destroying the inference which might have resulted from the absence of all regulations upon the subject.

Nor does the authority given to the corporation by the 6th section, to take mortgages *to secure the payment of any debt which may become due to them*, justify the conclusion, that they may create debts by loaning money upon notes; though it undoubtedly admits that they may have debts due to them, and this strengthens the argument in relation to their authority to give credit for premiums.

They have a right, by the 6th section, not only to *buy, but to sell or transfer United States or state stocks*. Debts, therefore, may lawfully become due to them upon such sales;

and it was such debts, and debts due for the shares or stock of the company, and for premiums, which the legislature intended they should be able to secure by mortgage.

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But it is said that this debt originated in, and belonged to the old company, which was dissolved by the act of February 27th, 1818; that the directors were merely trustees in relation to those funds, and were not bound by the restriction contained in the original act of incorporation. I do not find, in the act referred to, any thing to support this position. It is made the duty of the new directors to take the charge, management, liquidation and settlement, of the business and concerns of the original stockholders, upon themselves, to keep separate accounts, and after payment of all debts, &c., to distribute the overplus, &c. These powers are not different or greater than those conferred by the original act. There is no intimation of any authority, to make dispositions or investments of the funds, which did not exist in the old company, or which, as directors of the new company, they had no right to make in relation to the funds of the latter. Their power, as to both, was the same, and they were merely directed to keep the accounts distinct.

I am, therefore, of opinion that, independent of the restraining act, (2 R. L. 834,) the plaintiffs had no authority to discount notes by way of loan.

But admitting that they had, was the transaction in question affected by the restraining act? That act provides, "that no person, unauthorized by law, shall subscribe to or become a member of any association, institution, or company, or proprietor of any bank or fund for the purpose of issuing notes, receiving deposits, making discounts, or transacting any other business which incorporated banks may or do transact by virtue of their respective acts of incorporation;" and declares all notes and securities, for the payment of money, given to any company or association, not authorized as aforesaid, null and void.

The object of this act was to prevent banking operations from being carried on by any company or association of men, not expressly authorized by law to bank. The act is viola-

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ted whenever a company or association of men create a fund for, and actually apply it to the purpose of *issuing notes, receiving deposits and making discounts*, without authority by law to carry on banking operations. The fund must not only be *applied* to those purposes, but it must be created *for the purpose of being so applied*. What then is the evidence requisite to prove that such was the object of creating the fund? The ordinary and habitual application of the fund to those purposes would be conclusive evidence of the fact. But does an insulated case of discounting a note, by a corporation, ostensibly created for the purpose of insurance, and whose funds are actively and principally employed in that manner, afford evidence that the funds of that company were created, not for the purpose of insurance, but for the purpose of banking? Would a jury be authorized in drawing such a conclusion from such evidence? Assuredly not.

In the case of the *Utica Insurance Company v. Scott*, (19 John. 1,) the plea alleged, "that the fund was created for the purpose of issuing notes, receiving deposits, making discounts, and transacting all other business which incorporated banks may and do transact; and that, in pursuance of such intent, &c., the plaintiffs established an office or banking house, and issued notes, received deposits and made discounts." Here the offence is fully set forth, and I apprehend, that in order to bring a case within the restraining act, it is necessary to prove the substantial allegations contained in this plea. The opinion of Mr. Justice Spencer, in the case of *The People v. Utica Insurance Company*, (15 John. 394,) is very strong and explicit on this point.

In the case now under consideration, the plea is simply non-assumpsit, and there is no evidence that the plaintiffs have ever discounted any other note than that on which this suit is brought, (and those of which this is one of a series of renewals,) or done any other act which appropriately belongs to a banking institution. I am clearly of opinion therefore, that the note in question is not rendered void by the restraining act.

2. Was the note usurious in consequence of the interest having been taken in advance? NEW YORK,
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In the *Manhattan Company v. Osgood*, (15 John. 162,) this Court decided, that discounting a note *by a bank*, at the rate of *seven per cent.* is not usurious: and the same principle is perfectly settled in England, in relation to bills of exchange, or promissory notes, discounted either by private bankers or individuals *in the regular course of trade*. In *Lloyd, qui tam. v. Williams*, (2 Black. Rep. 792,) Blackstone, J. says, "Interest may as lawfully be received beforehand for *forbearing*, as *after the time has expired for having forborne*; and it shall not be reckoned as merely a loan for the balance." In terms, this position is applicable as well to interest taken in advance upon bonds, as upon bills of exchange and promissory notes; but it is qualified and limited by the cases which he cites to illustrate it. *Else, he says, every banker in London, who takes 5 per cent. for discounting bills, would be guilty of usury.* N. Y. Firemen
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In *Marsh v. Martindale*, (3 Bos. & Pull. 158,) Lord Alvanley expressly admits this to be the established law in relation to the negotiation of bills of exchange made in the usual course of trade; but he held the transaction in that case to be usurious, principally because the bill discounted was a bill *at three years*. He says, "The jury were impressed with a notion that a bill *at three years* was such a bill as no reputable man would discount; though it was said that some East India bills, at *two years*, had been discounted. Indeed, Lord Chief Justice Eyre seems to have thought that *the length of the date of a bill* was sufficient to afford a presumption that the discount was intended as a cover for a loan. And if we consider the effect of discounting bills at very long dates, the strength of this presumption will be manifest; for if the practice be carried to a great length, the interest will annihilate the principal. I think, therefore, that the discount of such a bill as this, (not coupled with the transaction respecting the annuity,) would have been *almost* sufficient to have afforded a presumption of usury."

The principle to be extracted from these cases, and from a variety of others which might be cited in confirmation of

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them, I hold to be this : that the taking of interest in advance is allowed for the benefit of trade, although, by allowing it, more than the legal rate of interest is, in fact, taken ; that being for the benefit of trade, the instrument discounted, or upon which the interest is taken in advance, must be such as *will*, and usually does, circulate or pass in the course of trade. It must, therefore, be a negotiable instrument, and payable at no very distant day ; for, without these qualities, it will not circulate in the course of trade. Under these limitations the taking of interest in advance, either by a bank, or incorporated company without banking powers, or an individual, is not usurious.

The note in question, therefore, was not usurious upon this ground.

3. Was it usurious in consequence of the interest having been calculated upon the supposition that 90 days were the fourth of a year, and 3 days the tenth of a month ? The effect of this mode of calculation is, to give to the lender interest for 365 days, upon a forbearance for 360 ; and where the interest is seven per cent. the amount received, upon this principle of calculation will exceed the rate allowed by law. Whether that excess be great or small is unimportant ; for the least excess is as much usury as the most enormous.

It is admitted by all the writers, and in all the cases upon this subject, that the intention of the contracting parties is the principal subject of inquiry, in determining whether a contract be usurious or not ; for if the intent of the contracting parties be righteous, the contract cannot be within the statutes of usury. (Ord on Usury, 37.) It is said by Mr. Justice Gould, in *Murray v. Harding*, (2 Bl. Rep. 865,) that "the ground and foundation of all usurious contracts is the corrupt agreement." Chief Justice Eyre, in *Hammett v. Yea*, (1 Bos. & Pull. 151,) says, "where a party, on a contract for a loan, *intentionally* takes more than 5 per cent. per annum for the forbearance of that loan, he is guilty of usury :" but he adds, "whether more than 5 per cent. is *intentionally* taken upon any contract for such forbearance, is a mere question of fact for the consideration of the jury and must always be collected from the whole of the transaction

between the parties ; and it never can be determined, that any particular fact constitutes or amounts to usury, till all the circumstances with which it was attended have been taken into consideration.

In pleading usury, a *corrupt agreement* must be alleged, and upon that the issue is taken. (2 Ch. Pl. 467. 1 Saund. 295, a. n. (1) Plea, in *Stewart v. Mack, & Farm Bank*, 19 John. 500.) Where more than seven per cent. therefore, is unintentionally received, either through an error in calculation or a mistake in drawing the instrument, the contract will not be deemed usurious. (*Navison v. Whitley*, Cro. Car. 501. *Booth v. Cook*, Freem. 264. *Bush v. Buckingham*, 2 Ventr. 83. *Buckler v. Mitlard*, 2 Ventr. 107. *Buckley v. Guildbank*, Cro. Jac. 678. *Glassford v. Laing*, 1 Campb. 149.) These cases all go upon the principle, that the *corrupt agreement* is the essence of the offence, and that a party shall, therefore, be permitted to show what that agreement was, and that it has not been correctly expressed in the written contract.

The payment and receipt of usurious interest is, *prima facie* evidence of a corrupt agreement. (1 Saund. 295, b. in note.) It must be conceded that more than seven per cent. per annum, was received upon the discount of the note, in this case. How is the presumption of law, that it was received in pursuance of a corrupt agreement, sought to be repelled? Not by showing that the sum paid for interest was greater than the parties intended should be paid ; that there was a mistake in telling the money, or that the Clerk who cast the interest, had fallen into an arithmetical error ; but by showing that the excess arose from the adoption of a principle of calculation, which the parties knew would give more than seven per cent. though they believed it was not a violation of the statute. In other words, the plaintiffs received more than seven per cent. because they believed that they had a legal right to receive more. If they judged erroneously, it was a mistake in point of law, and not in point of fact ; and unless there be something in the case of usury to distinguish it from all other cases, their ignorance or mistake in relation to the law, can afford them no protection,

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I have said that the question of usury is always a question of intent, and the case of *Hammet v. Yea* was cited in support of the position. There can be no usury, without an intention to take a greater rate of interest than seven per cent. But it is not necessary to the offence, that there should be *an actual intention to violate the statute*. It may be committed by one who, in point of fact, never heard of the statute. Whether the party intended to take more than seven per cent. by way of interest, is a question of fact, for the determination of the jury. If it be found that he did, it is an invariable inference of law, that it was taken in pursuance of a corrupt agreement, which consummates the offence. In *Hammet v. Yea*, it was admitted that more than five per cent. had been received by the plaintiff. It was contended that the excess was not received for forbearance of the loan, but as commission for the remittance of it. Whether it was received by way of forbearance, or of commissions for remittance, was the question of fact for the jury; and the observations of Eyre, Ch. J. are to be considered with reference to that state of the inquiry. If it had been admitted, that the whole amount received was intentionally received as interest, there would have been nothing for the jury to find. The law would have pronounced it a case of usury.

In *Marsh v. Martindale*, (3 Bos. & Pull. 154,) the jury found expressly, "*that the plaintiff did not think he was acting contrary to the statute.*" Lord Alvanley says, "there is nothing in that finding to prevent us from examining this transaction, and declaring *it to be corrupt, if it appear to us to be so in point of law;*" and the conclusion to which the Court came upon the case, is thus expressed: "*In this case we are of opinion, that sufficient appears to show that the agreement was corrupt in law, whatever the intention of the plaintiff may have been.*"

In the case of the *Maine Bank v. Butts*, (9 Mass. Rep. 55,) this principle is very clearly stated. The Court say, "It is probable that in this case, there was no intentional deviation on the part of the bank, but a mistake of their right. This, however, is a consideration which must not influence or

decision. The mistake was not involuntary, as a miscalculation might be considered, where an intention of conforming to the legal rule of interest was proved ; but a voluntary departure from the rate. An excess of interest was intentionally taken, upon a mistaken supposition that banks were privileged in this respect to a certain extent. This was, therefore, in the sense of the law, a corrupt agreement ; for ignorance of the law will not excuse."

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The *intent* of the parties is a legal inference from established facts. In a special verdict, it is not necessary that the jury should find *that the agreement was corrupt*. They find the facts and circumstances, from which the law infers either that it was or was not corrupt. (*Roberts v. Trenayne*, Cro. Jac. 507.)

That the principle of calculation adopted by the plaintiffs, was the one in general or universal use among banks, cannot alter the law of the case. A statute cannot be abrogated by custom or usage of a particular trade. In *Dunham v. Gould*, (16 John. 374,) which was also a case of usury, Chancellor Kent says, "the custom of merchants is not applicable to such a case. It is not a matter of trade and commerce within the meaning of the law merchant ; and if there were such a local usage, it would be null and void, and could not be set up as a cover or pretext to trample down the law of the land. The money lenders throughout the country might as well set up a custom of their own, and then plead it in bar of the statute."

Where the law is clear, no usage can control it. (Cro. Eliz. 85. Per Ld. Kenyon, in *Matthews v. Griffiths*, Peak. N. P. Cas. 202. *Ex parte Aynsworth*, 4 Ves. 678. Ord on Usury, 59, b. *The King v. Major*, 4 T. R. 750.) The statute of usury speaks of years and not of months. Interest is to be at the rate of seven per cent. per annum ; that is, at the rate of seven per cent. for 365 days ; for a legal year is 365 days ; the legal half of a year, 182 days ; and the legal quarter, 91 days : the law paying no regard to the odd hours. (3 Dy. 345, a. *The Bishop of Peterborough v. Catesby*, Cro. Jac. 166.) The custom or usage of banks or individuals cannot shorten a year to 360 days ; but a different mode of calculating interest on notes payable at 60

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or 90 days, and notes payable in 2. or 3. months, is established and practiced. (Vid. Tables in Chitty on Bills, last ed 608, 9.)

I cannot, therefore, resist the conclusion, that the note in this case was usurious, in consequence of interest having been calculated and taken, upon the principle that 90 days were the fourth of a year.

WOODWORTH, J. concurred, principally, on the ground that the note was usurious,

SAVAGE, Ch. J. This is an action of assumpsit against the defendants, as endorers of a promissory note, dated the 6th July, 1819, and drawn by Sturges & Sherman.

The defence is, 1. That the note is void, having been discounted on a loan of money by a company who want the legal power to do such an act. 2. If they have such power, that the note is usurious, and, therefore, void.

On the 2d of March, 1810, an act was passed, to incorporate the firemen of the city of New York, as an insurance company. The corporation was created for the sole purpose of insurance against fire, and marine insurance; and they were prohibited from being concerned in any trade or other business: provided that they might purchase United States stocks, or any state stocks, by way of investing their capital; or might receive a transfer of such stocks for the payment of shares or of any debts due to them, either before or after they commenced business. They had also power to sell and transfer these stocks.

By the act of February 27th, 1818, it is recited that the old company had been unfortunate and wished to wind up its concerns, and that a new company were desirous to be incorporated. It was, therefore, enacted, that the business of the old company be closed, and their effects divided among the stockholders, after paying debts. The new company was then incorporated with the power to insure against loss by fire, of houses, buildings and personal property; to make all kinds of marine insurance, and to loan money on bottomry, respondentia, or mortgage of real estate, and *chattel's real*; and, generally, to do and perform all matters

and things relating to the said objects. They were also clothed with all the powers of the old company: Provided, that nothing contained in the act should, in any way, be construed to grant banking powers. The directors were to manage the concerns of the old company, of which they were to keep separate accounts, and after payment of all debts, to distribute the overplus to the old subscribers and their representatives.

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N. F. FIREMAN
Insurance Co.

By.

Such is the authority under which the directors acted: we will next see what they have done.

The note in question, was given for two other notes, which were renewals of others. The transaction commenced as far back as September, 1817; and was originally, a loan of money, by the old company, to Sturges & Sherman, for which notes were discounted at 7 per cent. payable at 4 months. Those notes were paid by others; sometimes at 90 days, sometimes at 3, and sometimes at 4 months. They were all discounted by the company at 7 per cent., and the discount deducted in advance.

The secretary of the company testified, that his practice had been to cast interest considering 30 days the twelfth of a year; 60 days the sixth; and 90 days the fourth of a year. He charged half per cent. for 30 days; one per cent. for 60; one and a half for 90 days, and added to the product one-sixth, to make 7 per cent. The 3 days of grace he called one-tenth of a month. The plaintiffs knew this was his practice; and such is the usual course in other companies, and the common mercantile custom.

A corporation is merely a political institution. It can have no other capacities than such as are necessary to carry into effect the purposes for which it was established. (1 Kyd on Corporations, 70. 15 John. 383.) It is a creature of the legislature, and can have no powers but such as are given to it by its creator, either at the time of its creation or subsequently, or such powers as are incidental to those granted. (1 Kyd on Corp. 13, introduction. 15 John. 383.)

The act of 1810 created the company for the sole purpose of insurance against fire, and marine insurance. Surely the power of lending money has no necessary connection with

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insurance, nor is in any way incidental to insuring. It is, no doubt, very convenient for the company to have their funds productive, and in a situation whence they may be called in on short notice; yet this consideration does not give the power. But the act contains a direct prohibition. "The corporation shall not be concerned in any trade or other business, except insurance, &c. Provided, that they may purchase and hold or sell stocks." Here, then, is the mode pointed out in which they might employ their funds. It appears to me that the old company had no right to loan money, or discount notes, or transact any business except insurance and buying and selling stocks.

I will next inquire, what powers were granted by the act of 1818? By the third section of the act, the new corporation have authority to insure buildings and personal property against fire, and "to make all kinds of marine insurance, and to loan money on bottomry, respondentia, or mortgage of real estate and *chattels real*." Nothing is said about loaning money upon *personal security*, like negotiable notes; but the proviso declares, that nothing in the act contained, shall in any way be construed to grant *banking powers*.

This act gives powers (not possessed by the old company) to loan money upon securities specified, and it contains a restriction intended to limit those additional powers, by declaring that the legislature does not grant *banking powers*.

What is the meaning of the terms *banking powers*, is next to be ascertained. In *The Maine Bank v. Butts*, (9 Mass. Rep. 54,) Sewall, Justice, says, "that expression, (*banking principles*,) if it has any peculiar meaning, is an authority to deduct the interest at the commencement of loans, or to make loans upon discounts, instead of the ordinary forms of security for an accruing interest." Again; "The principal attributes of a bank are, the right to issue negotiable notes, discount notes, and receive deposits." (Per Spencer, J. 15 John. 390.) Previous to the restraining acts, there was no power possessed by a bank, not also allowed to individuals and private associations. They could, in common, issue notes, discount notes and receive deposits; the only difference was, that the former were not liable beyond their cor-

porate property, while the latter were accountable in their persons, and to the full extent of their private estate. The first restraining act was passed in 1804. It had for its object the guaranteeing to banks a monopoly of the rights and privileges granted to them, which had been encroached upon, or infringed by private associations. This was reenacted in the revised laws of 1813; and in 1818, the legislature found it necessary to pass the act of April 21st of that year, (sess. 41, ch. 236,) which places individuals upon the same footing with private associations, with the same view to a monopoly, by the incorporated banking companies. The first of these acts prohibits the formation of any bank or fund unauthorized by law, "for the purpose of issuing notes, receiving deposits, making discounts, or transacting any other business which incorporated banks may or do transact, by virtue of their respective acts of incorporation." The second prohibits any person, association of persons, or body corporate, from keeping any office of deposite, for the purpose of discounting promissory notes, or carrying on any kind of banking business or operations, which incorporated banks are authorized by law to carry on; or to issue any bills or promissory notes, as private bankers, *unless thereto specially authorized by law*. Assuming, therefore, what, in my opinion, cannot be controverted, that banking powers consist in the right of issuing notes, making discounts and receiving deposits, and that the business which incorporated banks may do, by virtue of their acts of incorporation, is prohibited to all others unless specially authorized by law,—it follows, conclusively, that both the old and new company have done what they were not only not authorized by their charter to do, but what was absolutely prohibited by the restraining act. This act cannot be evaded by making the note payable to individuals. There was a loan made upon personal security: Notes were discounted by the plaintiffs. The act declares all such notes void. Without examining the question of usury, in my opinion, the defendants must have judgment.

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Judgment accordingly.

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Now, I ought to have mentioned before, that though the two cases next preceding were argued at May term, 1823, yet the counsel for both parties, understanding that the question of usury, involved in each, would be again argued in the following case, which was then on the calendar, joined in requesting the Court to postpone the decision of the two former, till the argument in the latter should be heard. The Court were pleased to comply with the request. The following cause was argued at the last October term; and all three remained, under advisement to the present term. I was, therefore, the less minute in giving the discussions of the learned counsel upon the point of usury, in the two preceding cases; because I found that I had a very full sketch of almost every thing which had been advanced upon this point, in the notes which I had taken of the last argument.

**THE PRESIDENT, DIRECTORS & COMPANY of the BANK
of UTICA against PHILIP WAGER.**

Three things
necessary to
constitute usu-
ry; a loan, ta-
king more
than lawful
interest, and a corrupt agreement.

Assumpsit on a promissory note for 1000 dollars, against the defendant as maker, dated the 14th day of March, 1821, payable to the order of Sylvanus Smalley, and Walter Beecher,

Taking the interest in advance, on discounting a note, is not usury; though it was formerly held otherwise.

But, it seems, this is confined to bankers, and those who deal in commercial paper by way of trade.

The cases upon the two last points considered.

A bank having established certain days for discounting notes, discounts a note at 90 days, taking the interest in advance. At the discount day nearest the day when the note falls due, but previous to the latter, the note is renewed, the interest being again taken in advance; and the note is renewed the same way a third time; so that for part of the time for which the notes run, interest is taken at the rate of 14 per cent. per annum, owing to a lapse of the notes. This is not usury, unless there was an agreement upon the first loan, either express or implied, that the note should be thus renewed, or it otherwise appears that the transaction was a cover for usury.

90 days after date, at the Bank of Utica, and discounted by the bank. NEW YORK,
May, 1824.

The cause was tried at the Oneida Circuit, in November, 1821, before his Honor, (the late) Mr. Justice Platt. Bank of Utica
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The plaintiffs proved the making and endorsement of the note, the amount of which, including interest to the 10th day of January, 1822, was \$1039 86, and rested.

The defence was usury.

The defendants then proved that the note in question was the second renewal of a like note, which was made for the purpose of raising money by getting it discounting at the Bank of Utica; that all three of the notes were made for the purposes of discount, no consideration passing between the maker and endorsers.

Julius Augustus Spencer, a witness for the defendant, testified, that on the 15th of March, 1821, in behalf of the parties to the note in question, he carried it to the Bank of Utica, for the purpose of renewing a former note, and to pay the discount; that, on his presenting it at the Bank, some question arose among the officers of the Bank, whether the note could be renewed, the witness believed, on account of its not being a discount day; that one of the officers said he would go and see Mr. Hunt, the cashier, on the subject, and accordingly went out and shortly returned, saying that the cashier directed it to be done; that he then inquired how much he must pay for the discount? and was answered by one of the officers of the Bank, "18 dollars and 9 cents," which amount the witness paid, and received a like note, dated the 12 of December, 1820, and received no

In taking interest in advance on discounting a note, it is lawful to include the 3 days of grace in the computation.

To every practical purpose, the days of grace are a part of a promissory note.

But to take interest in advance upon discounting a 90 day note, calculated at $\frac{1}{4}$ of a year for 90 days, is usurious, and the note void.

Receiving usurious interest, intentionally, is sufficient evidence of a corrupt agreement.

The policy of the statute of usury vindicated.

Custom or usage will not be received to sanction usury.

A point once directly decided by this court, may be raised for the purpose of bringing a writ of error in another case; but the court will not hear it argued.

Lex mercatoria: what: how proved. Authorities to these points collated. *Griffin*, counsel, *arguendo*.

Custom and usage of trade. What is a good custom or usage: manner of proving them for what purpose they are evidence: held not to sanction a penal offence. Authorities to these points collated. *Id.*

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money ; that he did not object to the amount of discount which was demanded ; that he had at that time made no computation of the discount, and did not know whether it was too much or too little.

The defendant also proved that the two previous notes, of which the one in question was a continuation, (the first dated September 12th, 1820, and the second, December 12th, 1820, both corresponding, in all other respects, with the last.) were successively discounted, at the same Bank, each for the same sum of 18 dollars and 91 cents, and under circumstances, in other respects, similar to those, which attended the discount of the last. The first note was discounted on the 15th or 16th of September, 1820 ; and the second at the day it bore date. The first note was drawn and delivered to one Maynard, with a request to have it discounted for the parties ; and he procured it to be discounted accordingly. He applied to have it discounted the 12th September, which was denied on account of a formal objection to the note, which was afterwards rectified.

A witness for the defendant testified, that he had made a computation of the interest on the note in question, and that the interest on 1000 dollars, for 93 days, is 17 83½, for 90 days, \$17 26 ; for 89 days, \$17 07 ; that the discount on the same sum, for 93 days, is \$17 52 ; for 90 days, \$16 97 ; and for 89 days, \$16 78. The witness, on being requested by his Honor, the presiding Judge, to explain what he meant by discount in distinction from interest, stated, that it was defined by Pike and Daboll, in their Treatises on Arithmetic, and as the witness understood it. Discount is an allowance made for the payment of any sum of money before it becomes due, or upon advancing ready money for notes, bills, &c., which are payable at a future day. What remains after the discount is deducted, is the present worth, or such a sum as if put to interest would, at the given date and time amount to the given sum or debt. The witness further stated, that, allowing each of the three notes to have run 93 days, the interest would have been \$53 50½, and that the Bank had taken too much interest, by 77 cents ; that the whole time from the 15th of September, 1820, the time

when the first note was discounted, until the note in question became mature, was 273 days ; and that the interest for that time was \$52 35 ; that the difference between that sum and \$54 27, taken by the Bank, was \$1 92 ; and allowing the Bank to take interest in advance, without regard to discount, and include the days of grace, and without regard to the time the notes had run before being discounted, or the lapse of the notes, the Bank had taken 25½ cents too much on each note.

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Thomas Colling was then called, as a witness on the part of the plaintiffs, and testified that he was a clerk in the Bank of Utica, and had been for 9 years ; that the note in question fell due on the 15th day of June, 1821 ; that the discount on the same is \$18 09, and that sum was accordingly received for discount. The same drawer and endorsers had two notes previously discounted ; the first note was dated the 12th day of September, 1820, and became payable on the 14th day of December, 1820. The second note was dated the 12th day of December, 1820, and became payable on the 15th day of March, 1821 ; and the note on which this suit was commenced, is dated on the 14th day of March, 1821, and became payable on the 15th day of June, 1821 ; that the first note was discounted on the day of its date, as appears by the books of the Bank, and passed to the credit of the defendant, and the money drawn out *i. e.* his check ; but the money was not drawn until three days afterwards, a proposition having been presented to the board of directors on the 12th of September, 1820, the date of the first note, to discount it, which was acted upon, and agreed to by the board as he then understood ; and he was then told by the cashier, that such note had passed the board, and he was accordingly directed by the cashier to pay out the money whenever the note was presented. A second note was presented and discounted on the day of its date, the avails whereof were credited to the account of the defendant, and his draft for the proceeds received on account of the first note. The same sum for discount was received on this note as on the former. It appears by the books of the Bank, that the note on which this suit is brought, was discounted for the benefit of Sylvanus Smally, one of the en-

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dorsers, and passed to his credit, and his check for the proceeds and some money were received on account of the second note; that there was an understanding when this note was presented, that (if discounted) the proceeds should be applied towards the payment of the former note. The discount received by the Bank on this note was also \$18 09. It often happens, and is the ordinary mode of doing business, that the note in Bank is paid up before a new note is discounted.

The witness farther testified, that when a note is discounted, the amount is immediately deposited to the credit of the person for whose benefit the note is offered. When a note becomes payable on Thursday, which is not a discount day, a new note is generally presented on Tuesday previous, there being but two discount days in a week, viz. Tuesday and Friday; but if such note be discounted on Tuesday, the proceeds are placed to the credit of the person for whose benefit the note is offered subject to his draft, except in cases where there is an express stipulation at the time the note is presented, that the money shall be applied to the payment of some particular note. When, by any accident, it happens that a note is not presented on a discount day for which it was intended, the cashier is specially authorized by the board of directors, for the accommodation of the person presenting it, to discount the same as of the preceding discount day. The note upon which this suit is brought, was presented on Thursday, and discounted by the cashier on the special authority above stated. Notes are sometimes discounted before they are entered on the books, and, in this case, the books of the preceding discount day being closed, the note in question could not be, and was not entered upon the discount book till the following Friday.

He farther testified, that he did not know of any agreement to renew the first or second note: all the notes were discounted without any previous stipulation to renew them, to his knowledge.

He farther testified, that the duty of casting interest on notes, and keeping the discount book of the Bank, was assigned to him, and the proceeds of them were credited by him on the books of the Bank; that he has calculated in-

terest on all notes by the same rule, according to which the interest was calculated on these notes, by first computing the interest at 6 per cent. for 90 days, at 15 dollars, and for the three days of grace, one 30th part thereof or 50 cents, and then adding the 6th of that amount, \$2 58 $\frac{1}{2}$ for the other per cent. making in the aggregate, \$18 8 $\frac{1}{2}$, (1) without ever hav-

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(1) The difference in the manner of casting, between the bank and the defendant, will be illustrated by the two following operations:

THE BANK.

	\$1000	
	6	
90 days— $\frac{1}{4}$ of a year	4)60,00	
3 days grace— $\frac{1}{8}$ of a mo.	80)15,00	
	50	
Obtain $\frac{1}{8}$	6)15,50	
which is	2,58 $\frac{1}{2}$	
which added to int. at 6 pr. ct.	} 18,09	int. or discount for 93 days,
makes 7 pr. ct. int. or disc't.		
		\$18,09

THE DEFENDANT.

days	dolls.	days	
365	: 70	:: 93	
		70	
		365)65,10	(17,83,5.
		365	
		2860	
		2555	
		3050	
		2920	
		1300	
		1095	
		2050	
		1825	
		225	
From bank discount	} \$18,09		
deduct defendant's		} 17,83,5	
Difference			25,5 for 93 days.

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ing received any particular directions on the subject from the directors of the Bank; but that he had calculated interest as the cashier was in the habit of doing; and as he instructed the witness at the opening of the institution, having found the method in practice, the most easy and convenient.

He farther testified, that the interest on a 90 day note, like the present, is computed for 93 days, and amounts to \$18 8 $\frac{1}{2}$; but the interest received on this note, viz. \$18 09, upon the mode of computation usual in banks, is a fraction, say $\frac{1}{4}$ of a cent too much.

The counsel of the defendant objected to the competency of evidence to show the modes or customs of the plaintiffs, or those usual in banks or any association of men whatever, to justify the plaintiffs in taking more than 7 per cent interest. But the Judge received the evidence subject to the exception.

The witness then further testified, that the whole amount of interest received on the three notes, is \$54 27. The amount of interest at 30 days to the month, computed as above, according to the usage of banks, is \$54 25. 1000 dollars for 93 days, at 365 days to a year, is \$17 83 $\frac{1}{2}$.

The witness then made the following calculations agreeable to the usage of banks, viz.: Interest on \$1000 for three renewals, payable in 90 days from date, making the whole number of days 279, for which these notes ran including three days of grace to each note, is \$54 25. The interest on the same notes for 94 days to each note, that being the time for which the parties to the notes had the use of the money, both days being included, making, in the whole, 282, is \$54 83.

The witness further testified, that in cases where the Bank of Utica have had intercourse with the Banks of New York, where it was proper for them to charge 7 per cent interest, they calculated interest in the same way; that the

Bank of Utica have had various transactions with other banks, in which the same mode has always been adopted ; that if a balance is due from one bank to another, the way of calculating interest on such balance, would be to consider 30 the $\frac{1}{2}$ days of a year. This he believed to be the practice of all the banks in the state, as he found it to be so when he came into the Utica Bank, and has never discovered that it had been altered in any of the banks.

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The witness, on his cross-examination, testified, that when a note was presented at the bank, to renew a former note, he usually wrote on the face of it, "*to pay 1000,*" in red ink, or such sum as the former note amounted to ; and that when a note was paid up by a renewal, there was usually endorsed on the back, "*Rd.*" or, "*Renewed.*"

The two first notes were then produced to him, and on the back of the first note, dated 12th September, 1820, was endorsed, "*Rd. Wm. B. Wells, Tellr.*" and on the face of the second note, dated 12th December, 1820, was written by the witness, "*to pay \$1000,*" in red ink ; and on the back was written, "*Bank Rd. Wm. B. Wells, Tellr.*" On the face of the note in question, was written by the witness, "*to pay \$1000,*" in red ink.

The witness further testified, that in all the foregoing calculations by him, he had called 30 days a month, and 360 days a year.

A verdict was taken for the plaintiffs, by consent, subject to the opinion of the Court upon a case, and subject to all legal exceptions, on all points arising thereon, with leave to either party to turn the case into a special verdict.

The following calculations were furnished to the Court, on the argument, by the counsel for the defendant :

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NEW YORK, Calculation for 100 years, alluded to by Mr. Griffin *arguenda*
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Yrs.	Excess.	Yrs.	Excess.	Yrs.	Excess.
1	972 22	33	115804 01	67	1281658 68
	Int. 68 06	34	124882 51	68	1372347 01
	972 22	35	134596 51	69	1469383 52
2	2012 50	36	144990 49	70	1578212 59
3	3125 59	37	156112 04	71	1684309 69
4	4316 60	38	168012 10	72	1803183 59
5	5590 98	39	180745 17	73	1930378 66
6	6954 57	40	194369 55	74	2066477 37
7	8413 61	41	208947 64	75	2212103 01
8	9974 78	42	224546 29	76	2367922 44
9	11645 23	43	241306 75	77	2534649 23
10	13432 62	44	259170 44	78	2713046 90
11	15345 12	45	278284 59	79	2903932 40
12	17391 50	46	298736 73	80	3108179 89
13	19581 13	47	320620 52	81	3326724 60
14	21924 03	48	344036 18	82	3560667 54
15	24430 93	49	369090 98	83	3810886 49
16	27113 32	50	395899 52	84	4078620 76
17	29983 47	51	424584 77	85	4365096 43
18	33054 53	52	455277 92	86	4671625 40
19	36340 57	53	488119 59	87	4999611 40
20	39856 68	54	523259 96	88	5350556 42
21	43618 81	55	560860 38	89	5726067 59
22	47644 35	56	601092 83	90	6127854 54
23	51951 67	57	644141 55	91	6557787 28
24	56560 51	58	690203 68	92	7017704 75
25	61491 97	59	730490 16	93	7509916 30
26	66768 63	60	792246 69	94	8036592 66
27	72514 65	61	848676 18	95	8600126 37
28	78562 90	62	909055 73	96	9203107 44
29	85034 52	63	973661 85	97	9848297 28
30	91979 16	64	1042790 40	98	10538650 31
31	99389 92	65	1116757 95	99	11277328 05
32	107319 43	66	1196903 23	100	12067713 23

\$120677 13 yearly average.

Difference in the operations of Discount and Interest.

Am't.	Time.	Interest.	Disc't.	Differ- ence.	Present worth less by disc't.	Present worth less by the Int
\$1000	93 ds.	\$17 83	\$17 52	\$0 31	\$982 48	\$972 17
"	1 year	70 00	65 42	4 58	934 58	930 00
"	2 do	140 00	122 90	17 10	877 10	860 00
"	3 do	210 00	173 56	36 44	826 42	790 00
"	10 do	710 00	411 70	288 23	599 30	290 00
"	14 do	980 00	494 95	485 05	505 05	20 00
"	15 do	1050 00	512 20	537 80	487 80	50 less than nothing.

<i>Utica Bank.</i>	}	The plaintiffs loaned,	\$981 91
<i>Philip Wager.</i>			
		Interest thereon 3 months,	17 18
			<u>\$999 09</u>

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They, however, reserved in advance,	\$ 18 09
Interest thereon 3 months,	31
Paid at the end of the term,	1000 00
	<u>\$1018 40</u>

Difference, excess,	\$19 31
	4

Excess in one year on \$1000,	<u>\$77 24</u>
-------------------------------	----------------

Annual excess on the Utica Bank capital,	
\$1,000,000,	\$77,240 00
The bank has been incorporated 13 years,	
which gives to them of usury,	<u>\$1,004,120 00</u>

\$981 91 is loaned: no more is ever forborne,
68 73 interest thereon 1 year.

\$1050 64 due to the plaintiffs at the end of one year.

By their method of doing business, they, however, get at the end of the year:

	Principal, \$1000 00
Paid in advance,	18 09
Interest thereon one year,	1 27
Paid at the end of 3 months,	18 09
Interest thereon 9 months,	95
Paid at the end of 6 do.	18 09
Interest thereon 6 do.	63
Paid at the end of 9 do.	18 09
Interest thereon 3 do.	31
	<u>\$1075 52</u>
	1050 64
	<u>\$24 88</u>

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H. R. Storrs, for the plaintiffs. We claim to recover on the following grounds :

1. The receipt of interest *in advance*, on the notes discounted, was not usurious.

2. The discounting of the 2d and 3d notes, *before* the 1st and 2d respectively *became due*, was not usurious.

3. There was no *corrupt contract* between the parties, for taking more than 7 per cent. The facts repel the idea of any *intention* to take illegal interest.

4. The *second note* dated December 12, 1820, fell due March 15th, which is strictly 3 calendar months and 3 days. This note is, therefore, not usurious on any principle. If then, the last note were admitted to be usurious, the plaintiffs are still entitled to recover on the 2d note, *that not being, in law, paid*.

5. The second note of December 12th, was not given in pursuance of any original contract for usurious interest. There was no original agreement to discount a second note.

6. The mode of casting interest adopted was correct, and is not usurious.

7. The plaintiffs are entitled to recover on the money counts.

(a) 15 John.
162. 1. The right to take 7 per cent. by way of discounting a promissory note, is established by the *Manhattan Company v. Osgood*.(a)

(b) 1 B. &
P. 154. 2. We shall be told that discounting the 2d and 3d notes, before the 1st and 2d respectively became due, was usurious. In answer, we adopt the language of Eyre, Ch. J. in *Hammett v. Yea*(b) who puts this very case, "But," says he, "if part of the money were carried to the account of the borrower, though he did not mean to draw for it for some time, and did not actually draw for it till the whole time on the discounted bill was expired, no man would doubt of the fairness or lawfulness of the transaction ; and yet an interest is gained for the whole of that time, upon money not actually advanced." *Sewall, J.*, in the *Maine Bank v. Butts*.(c) speaks of this as the known and established course of banking business, and so far from being usurious, as constituting in connection with discounts, an important and acknowledg-

(c) 9 Mass.
Rep. 154.

ed source of profit, peculiar to this kind of institution. He describes this operation in the following language: "A borrower, who is unable to discharge his note at the expiration of the usance, or when the day of payment arrives, is under the necessity of preparing himself by requesting a discount of another note, which being to be presented on a certain day appointed for the business, the second discount is generally made some days before the preceding note is due; and as the purpose is only the punctual payment of that note, the proceeds of the second discount are never drawn from the bank, which has the benefit of the deposit until the adjustment is made." If it had been a part of the original agreement, that successive notes should be discounted upon this plan, with a view to swell the discount, the transaction might have been usurious; but nothing of that kind is pretended. It is the common case of one having money to pay; and applying to a bank to furnish himself with funds for that purpose. The defence fails for the want of showing any corrupt agreement. The *Bank of Chenango v. Curtiss*, (d) is a much stronger case for the defendant. He agreed with the bank in that case, to deposit 2000 dollars, take a loan of \$5000 and pay the interest on the whole 5000 dollars if it should return to the bank, still leaving his deposit there, and receiving nothing for it. This was holden not to be usurious, because the object of the agreement was fair; and though more than legal interest might have been paid, if the contingency had turned out against the bank, the honest intent of the parties would prevent its being usury.

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(d) 19 John
326.

3. Our answer to the general objection, that more than legal interest has, in fact, been taken, is also founded on the total absence of any intention to violate the statute of usury. The casting interest for the 90 days, as the $\frac{1}{4}$ of a year, and for the 3 days of grace, as the $\frac{1}{12}$ of a month, and thereby gaining interest on the fractions which a subdivision of the year, at this rate, would produce, was the result of an arrangement made at the bank, for the mere purpose of convenience. The object was decimal simplicity of time, and no greater or less divisor would reach the actual period so nearly. There was no agreement between the bank and the defendant, that the note should be renewed at all; much

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less, that it should be renewed at a sacrifice beyond what was the legal interest. This error does not render the note usurious. We say error, because it is clearly such, in the calculation of time. If neither party contemplated usury, it cannot be so, and any other doctrine would be monstrous.

It cannot be necessary to read the act for preventing usu-

(e) 1 R. L. ry. (e) This act consists of two branches. The first forbids the taking or contracting for more than 7 per cent. per annum, for money or other thing lent and declares all bonds, bills, notes, contracts and assurances whatsoever, &c., for securing more, to be utterly void. The second branch imposes the penalty of refunding the excess. This penalty attaches by the very terms of the act, whether the excess be received corruptly or not; but the greater penalty imposed by the first branch, the forfeiture of the contract, is not incurred, unless a corrupt agreement is proved to have been made at the time of the loan. If pure in its origin, 50 per cent. or any greater sum, may be afterwards taken, and it does not avoid the contract, though the second branch of the statute very properly requires that it should be refunded. Error is not enough. If the bank, then, have received too much, let the defendant resort to the proper remedy, which is an action for the excess. This is all he can do.

(f) T. Raym.
196.

All the authorities concur, that to avoid the contract, the agreement must be corrupt. The true distinction is laid down by Twisden, J. in *Rex v. Allen*, (f) that "if the party who lends the money, contracts for more than £6 per cent. all the assurance is void, but if he doth not contract for more than the statute allows, and afterwards he will take more, the assurance shall not be avoided, but the party shall forfeit the treble value." The forms of pleading furnish the most accurate test of principles. The manner of pleading usury, in avoidance of a contract, is always, "that it was corruptly, and against the form of the statute in that case made and provided, agreed by and between the said A. B. and the said C. D." that the former should lend and forbear, and that the latter should give and pay the usurious rate of interest; (g) to which

(g) 2 Chit. Pl. 467, and vid. *Farrel v. Shoen*, 2 Keb. 525. *Dunde v. Curser*, id. 35. *Hinton v. Roffe*, 2 Show. 329. *Swales v. Bateman*, Sir W. Jen. 409. Vide also 1 Keb. 629 Ord. 92.

the replication is, that the contract "was made by the said C. D. for a good and legal consideration, and not in pursuance of, or upon the said corrupt and unlawful agreement, or for the purpose in the plea of the said C. D. mentioned, in manner," &c.(h) There is not a doubt about the law, if these well established precedents are correct. The issue is always directly upon the corrupt agreement.

Thus in *Button v. Downham*,(i) which was debt on bond conditioned to indemnify against another bond wherein the parties were bound to one Wolmer, &c., the defendant pleaded the statute of usury, and that it was *corrupte agreeatum*, between him and Wolmer, that the defendant, for the forbearance of £20 for a year, should give to Wolmer £10, if A., his son were then alive, and that the obligation was made for that cause, and so void, &c. Upon demurrer, it was insisted that this was not usury, it being upon a contingency; but three of the Justices of the Common Pleas held it to be usury; "for the corrupt agreement (which is confessed by the demurrer) makes it usury, *and it is the intent makes it to be so, or not so.*"

It may be true that an agreement to take beyond the legal interest, wholly unexplained, will be intended usurious. But here the circumstances explain fully the manner in which it happened. The English statute of usury expresses a distinction much like that for which we contend. It contains a proviso,(j) that the act shall not extend to "covenants made upon a just and true intent had between the parties." Our statutes were re-enacted and continued down from the English by revisals from time to time, all being *in pari materia*, and the whole should be construed together. Indeed, there never has been any dispute about the construction, that there must be, in fact, a corrupt agreement.

In *Hammet v. Yea*, the defence was usury, and Rooke, J. said,(k) he could not but consider the defence in the same light as he thought a proceeding on the other branch of the statute, and thought the transaction entitled to as favorable construction, as if it were the subject of a penal prosecution; and Eyre, C. J. has explained and elucidated this whole doctrine in the same case.(l) "I repeat," says he, in conclusion,

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(h) Id. 616
Joy v. Kent
Hardress, 418.
Jenk. cent. 2,
case 70, p. 87.
88. *The King*
v. Arden, 3
Bulstr. 71, per
Coke, Ch. J.

(i) Cro.
Eliz. 643
Moore, 398, S.
C. called *But-*
ton v. Droman,

(j) 37 H
8, ch. 9, s. 6.

(k) 1 B. &
P. 156.

(l) Id. 151
154.

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(m) 19 John.
508.

(n) 19 John.
326.

(o) 2 Bl.
Rep. 865.

(p) *Hine v.*
Handy, 1 John.
Ch. Rep. 6.

(q) *Stewart*
v. Mechanics
& Farmers
Bank, 19 John.
500.

(r) 1 John.
Ch. Cas. 536.

(s) 3 Id. 395.

(a) Doug.
736.

(t) 16 John.
367.

"that I cannot agree, that in usury, more than in any other case, the whole transaction is not to be taken together; that it is not to be analyzed and reduced to all the parts of which it is to be composed, and to all the conclusions of fact which fairly result from the whole of the evidence, and that the law does not arise from a fact, so considered. Whether more than 5 per cent. be intentionally taken for the loan and forbearance of money, is a question of fact to be decided by the jury." It was maintained in that case, as in the present, that a certain set of facts were, *per se*, usurious, but the whole Court repel that idea throughout the case. The reasoning of Eyre, C. J. is adopted by Spencer, C. J. in *Stewart v. Mechanics' & Farmers' Bank*, (m) who declares, that in that, as in every other case, where the question of usury is raised, all the facts and circumstances are to be taken into view. This is but a reiteration of the doctrine well established before, from the earliest cases down to *The Bank of Chenango v. Curtiss*. (n) Gould, J. in *Murray v. Harding*, (o) says, "the ground and foundation of all usurious contracts is the corrupt agreement." The excess should be made a condition of the loan; (p) and so essential is the corrupt agreement deemed, that even in Chancery, where pleading is stripped of form and reduced to its essential principles, it is usual to plead the agreement in terms, and to aver that it was corrupt. (q) In *Eagleston v. Shotwell*, (r) it was made a condition of the loan, that the borrower should take part in insurance stock, above its value in the market, and the decision proceeded upon this ground. The decision in *Thompson v. Berry & Van Beuren*, (s) was founded on open exaction. The case of *Lowe v. Waller*, (a) was considered upon all its circumstances; the question of usury was referred to the jury, who found that there had been usury, and on a motion for a new trial, Ld. Mansfield said, "the only question in all cases like the present is, what is the real substance of the transaction, not what is the color and form." So, in *Dunham v. Gould*, (t) the jury were charged, "that if they believed the exchange of notes to have been for the purpose of raising money at a greater rate of interest than 7 per cent. per annum, which they were warranted to infer from the evi-

dence before them, then the transaction was usurious," thus putting the usury upon the intention and purpose of the parties. The opinion of the Chancellor in that case,^(u) goes upon the same principle. In *Spurrier v. Mayoss*^(v) Ashhurst, commissioner, says, "my first impressions have been altered by the arguments and the facts of the case. To make the contract usurious, it must be apparent, either upon the face of it, or by evidence, that the intention of the parties in the creation of it, was, by means of shift or device, to take more than legal interest for the loan or forbearance of money." In *Tate v. Wellings*, Buller, J. says, "here the defence set up is, that the contract itself was illegal, and in order to support such a defence, it must be shown that it was usurious at the time when it was entered into, for if the contract were legal at that time, no subsequent event can make it usurious." *Thompson v. Thompson*,^(w) was the case of an usurious agreement at the time, and in *Thompson v. Woodbridge*,^(x) the Court lay down the distinction for which we contend, in terms, that "where usurious interest is not originally contracted for, but is afterwards received, the party receiving it is subject to the penalty provided by the statute, but the note, or other security, is not avoided." So, per Ld. Mansfield, in *Abrahams v. Bunn*,^(y) "there may be usury which cannot affect the debt or avoid the contract. The clause that avoids the contract, is where the contract is for more than 5 per cent." Courts of Equity refuse to lay down any general rule, but always put themselves upon the circumstances of each case, on the question whether there be a shift to evade the statute.^(z)

The *Maine Bank v. Butts*,^(a) will, doubtless, be loudly appealed to; but, upon examination, will be found, instead of sustaining, to defeat the defence. How that case was decided, on being finally submitted to a jury, does not appear, but admit that it was a case of usury: the company had discounted for three years, a series of small notes given to secure the interest semi-annually, on two large notes, one payable in two, and the other in three years. The transaction was usurious on its face. The bank took the notes with a knowledge of the excess, under the idea that they were pri-

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(u) Id. 374.
(v) 1 Ves
Jun. 533.

(w) 8 Mass.
Rep. 135.

(x) Id. 256.

(y) 4 Barr.
2253.

(z) 1 Mad.
Ch. 241

(a) 9 Mass.
Rep. 49.

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vileged. The Court repel the idea of privilege, and at the conclusion, they state the very case under discussion, and distinguish it from the one which they decide. "The mistake," say they, "was not involuntary, as a miscalculation might be considered, where an intention of conforming to the legal rule of interest was proved; but a voluntary departure from the rate. An excess of interest was intentionally taken, upon a mistaken supposition that banks were privileged in this respect to a certain extent. This was, therefore, in the sense of the law, a corrupt agreement, for ignorance of the law will not excuse." But it will be seen, by a remark just before the one quoted, that strong as that case was, the Court would not be understood as deciding that it was one of usury. "How that is in the case at bar," say they, "we are not called upon to decide at this time, but we are all of opinion, that the defendant is entitled to a new trial." Why? because, as will be seen by the case, the Judge did not submit the question to the jury; so that both in its reasoning and result, that case comes to the very point for which we contend. The Court distinguished carefully, lest counsel should dream of a mistake being usurious. "That," say the Court, "was a voluntary contract." Not so in the case under consideration. All business is done in the Utica Bank at 7 per cent. and the Clerk has merely discounted by an erroneous rule. There is nothing about this excess in the original contract, as there was in *The Maine Bank v. Butts*. No terms are specified; every thing passes on in silence, as of course. The Clerk says, he reserved the \$18 09 to the Bank, as the discount. This is now complained of as *erroneous*, but that does not make it usurious. It was not complained of, nor even noticed or thought of at the time. No excess was understood to be reserved for the loan, which is essential to constitute usury. (b)

(b) *Cloyton's*
case, 5 Rep.
70.

(c) Cro. Jac.
678.

Buckley v. Guildbank, (c) is a strong case that a mistake will not amount to usury. In that case, it was found by special verdict, that the agreement was to lend £120 for a year, at legal interest. The agreement was made the 23d of May, 1617, and a bond was drawn by a scrivener, dated that day, by which the defendant became bound to pay £132, upon

the 24th of May next ensuing, which some of the Court allowed might refer to the same month of May in which the bond was dated, which would make it usurious if unexplained; "but they all held," says the book, "although it should be expounded to refer to May 24th, the same month and year, which is the next day, as it was in *Prescott's case*, (Cro. Jac. 646,) yet forasmuch as the agreement is found to be to make the loan for a year, and that the assurances were for the payment at the end of the year, and by the scrivener's mistake is made payable the next day, it is not usury within the statute; for there was not any corrupt agreement betwixt them, but a true and absolute agreement." It will be seen also, by Wood's Institutes of the Laws of England, (d) a book remarkably correct in its definitions, that usury implies a gain by contract, in consideration of the loan; but there can be no contract unless the subject is understood, and the minds of the parties meet upon the terms of the loan. In *Reynolds v. Clayton*, (e) Drew, sergeant, *arguendo*, mentioned the case of one Becher, adjudged in the King's Bench, who delivered wares of the value of £100, and took an obligation to re-deliver them in one month, or pay £120 at the end of the year, which was holden usury; but the Court replied that this must depend upon the intent with which the contract was made. In *Crow v. Brown*, (f) judgment was given for the plaintiff, on a bond, upon demurrer to a plea of usury, because it was not said that the defendant was indebted to the plaintiff at time of bond given, or that there was an agreement to lend money upon the usurious contract; and *Rex v. Ward*, (g) *Turner v. Hulme*, (h) *Dagnall v. Wylie*, (i) go also upon the ground of agreement. In *Murray v. Harding*, (j) De Grey, C. J. enters into a full commentary upon the previous cases which relate to this point, and reduces them all to the question, whether the contract be made in good faith, and Gould, J. (k) uses a very strong expression to the same purpose. Within the spirit of all these cases, if the contract with the bank was *bona fide*, if no usury was intended, there is no usury. As the Court remark in *Buckler v. Millerd*, (e) "it depends upon the agreement, and the party may show any thing to make it appear there was no corrupt agreement." *Phœnu-*

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(d) p. 432

(e) Moor
397, 398.

(f) 12 Mod
385, and vid
1 Leon. 96.

(g) 12 Mod
517, per Holt
O. J.

(h) 4 Esp
Rep. 11.

(i) 2 Campb
83.

(j) 2 Bl
Rep. 862, 3.
(k) Id. 865.

(e) Ventri
107, 8.

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(f) 2 Munf.
Rep. 438, 9, &
vid. 1 Bulstr.
17.

thorities, both ancient and modern, speak a language on this point too uniform and plain to be mistaken. To the other authorities, may be added what was said in *Watkins v. Taylor*.(f)

In *Jenkins*, (Cent. 2, case 70, p, 87, 88,) it is said that the intent is traversable; that an act of parliament may make the intent issuable, and the case of a corrupt loan under the statute of usury, is put by way of illustration. If so, and there is any thing in the maxim, that pleading is an index to the law, the corrupt intent must appear. We cannot know the agreement unless we look at the intantion. This the essence of every contract, as well as of every crime. There must be a criminal intention, or there can be no guilt, Upon any other principle, the statute will operate as a snare, in which the artful and designing may entrap their neighbors, by setting up and establishing usury, where none was ever intended.

4. Thirty days being called a month in the calculation of the Clerk, it will be said this gives an excess of 5 days in the whole; but it will be found, according to our fourth point, that there was no excess of time in calculating for the second note. There was a full allowance on this of three calendar months and three days. Admitting that there is in the other an usurious difference between 90 days and 3 months, the objection has no application to this note, upon which we are entitled to recover, the same as if the time had been expressed in months instead of days. If the last note received in payment for the second, be void for usury, the second remains due, and we may recover upon this. The authorities are abundant, that where a contract is valid originally, a security for the money due upon it, taken afterwards but void by the statute of usury, leaves the original contract in full force and effect.(g) The second cannot be connected with the first, which was a distinct and independent contract. Each of these notes are, in fact, a consideration for a distinct loan.

Gray v.
1 H.
1 Fer-
Shaen,
nd. 294.
v. Ma-
9 John.
47, 150.
ld v.
nd, 6
24.
v.
yne, 3
Rep.
3 Anstr.

In *Callcott v. Walker*,(h) it appeared that the plaintiffs at law acted as bankers, and at the end of every quarter struck a balance, in which was included the principal money advanced by them, all interest then due upon it, and a com-

mission of 5 shillings for every £100 advanced : this balance was, at the end of every quarter, converted into principal, and carried interest ; this the defendant at law contended to be usury, and insisted upon having an injunction continued against the plaintiff's proceeding at law. The Court were of opinion that it was not usury ; and they declared, that " the custom of the place and the practice of the parties being to strike a balance at these periods, brings it to the case of a fresh agreement, at the beginning of each quarter, to lend the sum so due." It will not, then, we trust, be insisted, that these different discounts were all parts of one continued entire contract ; for each was, in fact, a new loan. If the first agreement was usurious, the Court will regard it as a nullity, but they will not travel about to seek for grounds of connecting it with a subsequent act, in order to overthrow that also. The second note may well stand independent of the other. Every presumption should be against usury or other illegality, and in favor of a contract entered into by parties fully competent to contract. We do not live in the age of the writ *de hæretico comburendo*. The statute is to receive its fair construction, and while on the one hand, the Court will guard against the shifts and evasions by which usurers may seek to avoid it, they will never extend its provisions to an honest man who has no intention to violate it. The second note was not given in pursuance of any contract at all, beyond a bargain for a fair loan at the time. The preceding note cannot be called in as a consideration. The Court will not connect it with the second, unless this was done by the agreement of the parties. A continuation is not to be presumed. The second was a distinct discount of a new note.

6. But the mode of calculation was correct. If the objection be true as to months, it is so as to days. Who ever heard, that in fractions of a month, days are not always taken in a ratio to 30 ? This is the rule of all mankind, to which the Court may look as to the common usage ; and of which they may (according to the practice of Ld. Mansfield) inform themselves at their chambers, by inquiries of bankers. No other rule ever prevailed. Will the Court go into

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NEW YORK, May, 1894. a minute examination, to see on which side some small fractions may lie upon a cast of interest? Suppose a note dated

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We agree that no custom shall control the statute of usury; but it is allowed to control as to the manner of computation under the statute. Even by the rule of casting interest in Chancery, a little more than 7 per cent. is given.

(i) *Connecticut v. Jackson*,
1 John. Ch.
Rep. 17, 18.

Such is also the rule of this Court. The trifling fluctuations of $\frac{1}{2}$ of a day, or other small fractions of time, between debtor and creditor, never present the grave question of usury. They rest on mere convenience of calculation. Perfect accuracy is unattainable in practice. The search is after the most equitable rule. Does not the principle of calculation, adopted by banks, give the most equitable result, consistent with reasonable facility in doing business of this nature?

(j) *Booth v. Cook*, Freem.
264. *Nevison v. Whitley*,
Cor. Car. 501. *Livingston v. Bird*, 1 Root,
303. *Orr v. Churchill*, 1 H.
Bl. 232, per
Ld. Loughborough.
Buckley v. Guildbank,
Cro. Jac. 678. *Smith & Wilson v. Beach*,
3 Day's Cas. 268. Ord on
Usury, 38.

(k) *Cowp.*
112. *Lofft*,
595, S. C.

(l) *Id.* 115.

Such a practice is untouched by the statute of usury, either upon the principle of mistake, or the absence of any corrupt agreement, according to the cases already cited and others; (j) or upon the settled usages of trade within the case of *Floyer v. Edwards*. (k) The language of Ld. Mansfield, in the latter case, goes directly to the present. "What," says his lordship, (l) "are the terms of the contract? Are they any new fangled terms? So far otherwise that the agreement barely cannot be called an universal practice; yet it is the general practice of the trade. It is true, the use of this practice will avail nothing, if meant as an evasion of the statute, for usage certainly will not protect usury. But it goes a great way to explain a transaction; and in this case is strong evidence to show that there was no intention to cover a loan of money. Upon a nice calcula-

tion, it will be found that the practice of the Bank in discounting bills, exceeds the rate of five per cent. ; for they take interest upon the whole sum for the whole time the bills run, but pay only part of the money by deducting the interest first; yet this is not usury."

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J. A. Spencer, contra. The defendants claim the judgment of the Court on the following grounds ;

1. It was *usurious* for the plaintiffs to take interest for the time the first and third notes had run, before being discounted by them.

2. It was *usurious* for them to take interest on the second and third notes, when presented for renewal of the first and second notes, for the time they had already received interest on those former notes.

3. It was *usurious* for them to take interest in advance for the days of grace.

4. It was *usurious* for them to take interest in advance without regard to the rules of rebate or *discount*.

5. It was *usurious* for them to take *over seven per cent. interest in advance*, by shortening the year, thereby raising the rate.

On a full development of this case, it will be seen that there is not only usury here, but that the plaintiffs have pursued a systematic course of usury for a series of years, and to an immense amount. I admit the principle established in *The Bank of Chenango v. Curtiss*.^(m) It is no doubt a correct general rule, that where the receipt of more than 7 per cent. is, by the agreement, to depend upon a contingency, it is not usurious ; nor do I question that the security objected to for usury, must be contaminated with it in the outset. If then pure, no subsequent act of usury can corrupt it. Another position is conceded ; that where a security is taken for a loan pure in its origin, and afterwards an usurious note is taken, as a substitute for the first, the latter is void, and the first security remains in full force. I also admit that to constitute usury, the excess must be taken or contracted for intentionally, with the qualification that there may be a legal intention as contradistinguished from an

(m) 19 John
326.

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actual one. If the whole be matter of mere mistake or miscalculation, the security will not be avoided. If the parties intend to confine themselves to a correct rule, but by a mere error in adding, subtracting, &c., more is received or finds its way into the contract, this will not vitiate it. So of a mistake in counting money, as calling a 5 dollar bill 3 dollars, and thus receiving 2 dollars excess. There can be no dispute about such mistakes. They are not usury, *per se*.

With these concessions, we have very nearly disposed of all the cases which have been quoted; and if we cannot distinguish our cause from them, we cannot, with any confidence, ask a judgment for the defendant.

(n) Secs. 35.
ch 64, s. 5.

The amount involved in the decision here, is a mere trifle when compared with the consequences which are to follow it. In the latter point of view, the question is no less than whether this company are by their charter absolved from those legal restraints which bind individuals, whether they have a right to rise above the laws of usury, and take what interest they please. In the very act creating them, (n) they are placed in a situation subordinate to the laws of this state and of the United States; and the rate of interest is declared only as to notes at 60 days. They are then subject to the statute of usury.

(o) 17 John.
176.

This was accommodation paper, one note being received in substitution for another, in the ordinary course of bank business. The whole was one continued transaction, like that in *Powell v. Waters*; (o) the 2d and 3d notes being mere renewals of the 1st and 2d; and it follows upon one of the principles conceded in the argument, that if the first note was void, the others are equally so.

1. As to the first and last notes, they were both discounted after their respective dates. We ask, then, what right had the plaintiffs to demand interest for the time which the notes had already run? If it was usurious to receive an excess of interest for 80 days, or for a longer term, it was equally so to receive it for one day as on the last note, or 3 days as on the first. The authorities establish beyond all question, that an accommodation note, discounted at more than the usual rate of interest, is usurious. In *Mann v. The*

Commission Company, (p) Spencer, J. in delivering the opinion of the Court, says, "I take it to be clear, that if a bill or note be made for the purpose of raising money upon it, and it is discounted at a higher premium than the legal rate of interest, and where none of the parties whose names are on it can, as between themselves, maintain a suit on the bill when it becomes mature, provided it had not been discounted, that then such discounting of the bill would be usurious, and the bill would be void." The same point is decided in *Powell v. Waters*, (q) and *Bennet v. Smith*. (r) Will this also be put on the ground of unintentional error? The business was done by a Clerk of the bank, an officer who, I believe, is seldom found to mistake a day.

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(p) 15 John
55, 6.

(q) 17 John
176.

(r) 15 John
Rep. 355

3. This was either a calculation of interest on the first and last notes, for a time which they had already run, or (upon the principle that the whole was a continued transaction) it was doing what is equivalent to the objection in the first point, by taking interest on the 2d and 3d notes when presented for renewal, for the time the bank had already received interest on the two preceding notes. The 2d note was presented at the end of 87 days, from the time the first was presented. Upon this 2d note, they take 90 days interest, having before taken interest for the same time on the first. Had the second note been presented at a different institution, it would have been another thing; but here they were entitled to nothing but the legal discount for the time which run on in the course of these renewals. What authority had they thus to receive 14 per cent. for several days of that time? Will the Court screen them by calling the second note a new loan? It is plainly but a continuation of the former, and nothing less than 14 per cent. for a part of the time. So as to the 3d note.

3. I have not been able to find an adjudged case in which interest is allowed for the three days of grace. These are matter of grace or indulgence to the defendant. Blackstone says that our sturdy ancestors would not submit to be holden punctiliously to the precise day of payment; they could not be turned so shortly round, and, therefore, these days

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(r) 3 Bl.
Com. 277, 278.
(s) 4 T. R.
148.

(t) 1 B. &
P. 144.

were allowed.(r) It is true that in *Brown v. Harraden*,(s) it was decided that a suit could not be commenced till after these days had expired ; and Lord Kenyon intimates that interest may be claimed for them ; but if this be admitted, it does not follow that it may be taken in advance. Suppose a note at 30 days with interest ; and that on the 30th day, the maker should tender the whole sum due, could the payee refuse, unless interest were also tendered for three additional days? If the payee could not force the days of grace upon the maker, he cannot exact interest. There is no case upon this question, except *Brown v. Harraden*, and there the remark of Ld. Kenyon was entirely *obiter*, and made after he had disposed of the only real question in the cause. Nothing is said of this in *Hammett v. Yea*,(t) where in other respects the calculations were extremely nice to make out usury. All the elementary writers who assert that interest may be claimed for the days of grace, refer to what was said in *Brown v. Harraden*.

4. We are aware that the *Manhattan Company v Osgood*, relied on by the plaintiffs' counsel, does decide that taking the interest in advance is not usurious. One word as to this case. It is new. No other decision has been made directly on this question.

[*Woodworth, J.* It is, notwithstanding, an authority here by which we are bound.]

Spencer. A writ of error is brought in that cause.

[*Woodworth, J.* That makes no difference. The decision is in point ; and, till reversed, we must abide by it.]

[*Sutherland, J.* There is but one way of questioning our opinions upon a point directly involved in the cause decided. That is by bringing a writ of error. If we sit to hear them questioned in this Court, there is nothing settled by any decision which we can make. On a point incidentally decided, it might be different.]

Spencer. It was necessary to raise the point here in order to avail ourselves of it upon error, should the Court be against us.

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[*Savage, Ch. J.* You are undoubtedly right in raising the question, but a majority of the Court are decidedly against hearing it argued.]

Spencer proceeded to the 5th point.

5. This relates to the question of intention, and the force of usage. If one, on loaning money, take more than 7 per cent. at the time of the loan, the law will fix the intent. The bank clerk says, that Hunt, the cashier, ordered him to discontinue the calendar year, and calculate by the rule adopted in relation to these notes; and that he had done so ever since he came into the institution. Was either the cashier or the clerk ignorant of the consequences which would follow? The almanac is a part of the law of the land, (u) and every one will be presumed to understand it. If the conventional standard take more than 7 per cent. the law will imply intention and corruption. A loan is for a year's per cent. or more, or less. The parts of a year are in question. The statute does not mention months, or any term short of a year. It speaks of a loan *for a year, or, a longer or shorter time*. The necessity of resorting to months, upon principles of convenience is denied. The legislature knew that interest could be computed by years and days with perfect ease. Why then resort to months? The answer given by the plaintiffs is, that they have been guilty of taking interest in this manner for more than 10 years, and that their neighbors are as guilty as they are.

(u) *Domina Regina v. Dyer*, 6 Mod. 41, per Holt, C. J. *Brough v. Perkins*, Id. 80, 81, per Holt, C. J.

In *Marsh v. Martindale*, *Ld. Alvanley, Ch. J.* gave his opinion, in terms, "that if a man agree to take more than 5 per cent. for the forbearance of money, the law declares that such an agreement is corrupt, within the statute of Anne, whether the party thought, at the time, that he was acting contrary to the statute or not." That case was a bill of exchange for £5000, for which a bond was substituted, payable at 3 years, and £750, the precise legal interest, was

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taken in advance. All the points decided were material to the present case. The first was, that taking interest in advance is usury : 2. That taking more than legal interest on a loan, in any case, is usury : and 3. That this is a question of law. "And though (says the Ch. Justice) the jury have found that Sir Charles Marsh did not think that he was acting contrary to law, there is nothing in that finding to prevent us from examining the transaction, and declaring it to be corrupt, if it appear to us to be so in point of law without sending the case back to a jury to find the corruption."

The custom relied on must be very limited. The Court will see, by an examination of our bank charters, that they are rarely authorized to take more than 6 per cent. interest. This usage could not have existed any where in the state, till this bank was chartered, 13 or 14 years ago. The usage of shortening months, &c., must have been confined, before this to discounts at 6 per cent. which would not have reached the sum allowed by the statute of usury. There is, then, no usage to influence the case.

(v) 16 John
967.

(w) 9 Mass.
Rep. 49.

But if there were usage, I deny its force when set up to control the statute of usury. I do this on the authority of *Dunham v. Gould*, (v) decided by the Court of Errors, in which the late Chancellor examines all the cases upon this point, and shows that they rest upon distinct principles. Suppose a loan of \$1000, at 3 years ; and 3 separate notes, at 3 years, given simultaneously for the interest, these three notes also drawing interest. This transaction is reached, exactly, upon banking principles. Such was the case of the *Bank of Maine v. Butts*. (w) \$10,000 were loaned—4000 for 2 years, and 6000 for 3 years—and small notes, dated at the same time, and payable at 3 years, were taken on interest to secure each accruing years' interest upon the large notes. This was holden usurious ; and the Court adopt the sensible distinction between a mere miscalculation, and an intention to compute by a usurious rule. Have the plaintiffs shown any mistake in their arithmetical calculations ? No. They understand themselves perfectly. They are right throughout, in fractions of years, months, &c., and the result is correct. I hope the Court will keep in view the difference be

tween a mere mistake of a figure, a miscalculation, and the voluntary application of a mistaken rule. In the latter case it is usury. It cannot be excused by the force of usage, or any other pretence. Suppose the merchants of a city should all lighten their weights, and contract their yards, could they shelter themselves under this usage, of their own creation, from the penalties inflicted for selling by false weights and measures?

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The agreement may be perfectly pure; yet if more be taken than 7 per cent. as a premium for the loan, by force of any pretended rule or custom, it is void.(x)

(x) *Fisher*
v. Beasley
Dougl. 235
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If the bank retained more than 7 per cent. knowingly, it was usury, though Wager did not know it. It is enough that the party who makes the loan understands the subject. The authority to the agent was, to pay what was demanded upon the third note. This was done. The bank demanded \$18 09, and it was paid accordingly. The agent meets the proposition made by the bank. Usury never could be reached, if the counsel are allowed to refine away this case by saying that the bank acted without an usurious intent. It might as well be said they could have no criminal intention, because (being a corporation) they had no soul.

E. Griffin, (same side.) It will be recollected, that the sum of \$18 09, was taken for interest *only*. Here, then, is a case where an incorporation, created for the purpose of loaning money, and subject, like an individual, to the operation of the statute to prevent usury, have thought proper, deliberately, intentionally, and for years, to take over seven per cent. per annum. One would suppose, that the bare statement of facts would be a sufficient answer to all that has been, or can be said in justification of the practice adopted by the plaintiffs.

The statute of usury declares,(y) "that no person or persons, whomsoever, shall hereafter take, directly or indirectly, for the loan of any moneys, &c., above the value of £7, for the forbearance of £100 for one year; and so after that rate, for a greater or lesser sum, or for a longer or shorter time." All notes, &c., for the payment of any principal or

(y) 1 R. L.
64, s. 10.

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money lent, &c., are, by the same action declared utterly void. That the plaintiffs have taken more than at the rate of £7 in the hundred, for the loan, is proved by their own clerk, who was instructed, by the cashier of the institution, to receive it. It further appears, that they have taken interest in the same way for more than nine years. The statute declares the note *void*; and it would seem as though this Court had little else to do, except to permit the will of the legislature to have its effect.

I will, however, proceed to examine the grounds relied upon by the plaintiffs' counsel, in justification of taking over *seven per cent. per annum for interest*. It is said that there is no *corrupt agreement*. In the first section of the statute, and which is the section declaring the notes, &c., void, nothing is said about a corrupt agreement. The words are, that "no person or persons whomsoever shall take directly or indirectly." One would suppose, from the words used, that if a person should *intentionally* take *for interest* over seven per cent. the statute would be violated, and the security void. If it was taken through mistake, by which I mean a mistake of the fact, I should certainly not consider the statute violated. But if intentionally taken, the note is either void, or the statute for the prevention of usury is a dead letter. The will of the legislature is nothing. The idea of the necessity of our proving a corrupt agreement, which is so emphatically required of us, is derived from the English decisions, which are mere expositions of the statute of Henry the 8th. A short examination of the English statutes of usury, and a comparison of them with our own, will furnish a sufficient reason for declaring those decisions inapplicable here though I do not wish to be understood as admitting, that the manner of taking the interest, in this case, does not furnish what the Court will feel itself bound to consider as conclusive evidence of a corrupt agreement, if any such evidence were necessary.

The statute of Henry the 8th, which is the foundation of all the statutes against usury, and repealed all former acts, commences with these words: "no person, by way of *corrupt bargain*, &c., shall take, &c." The statute of 21 Jac. 1, and 12 Car. 2, were passed with a view of reducing the rate of in-

terest, leaving the statute of Henry the 8th, in all other respects, in full force. The statute of Anne reduces the rate to 5 per cent. and declares the contracts and securities for more void. These statutes being all in *pari materia*, are to be construed together; and, therefore, it is necessary, under the English statutes, that there should be a corrupt agreement.

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Our statute says, "If any person shall take directly or indirectly," without saying, *by way of corrupt bargain*, "the security shall be void." The English decisions on the statute of Henry the 8th, are therefore inapplicable, owing to the manifest difference of language used in the two statutes. It may be urged, that this construction includes the man who takes over 7 per cent. by mistake. I answer no; for the man who receives over 7 per cent. not knowing that he does so receive, is not within the statute. The taking within the statute is an act of the *will* as well as the *hand*. It is not necessary that one should *agree to give*, and another *to take* over 7 per cent. to make the security void. I put a case; suppose a person, about to discount a note, should calculate interest or discount at 8 per cent.; the borrower not knowing the manner of calculating, but supposing that the interest was calculated at 7 per cent. takes the money, deducting this discount. Is not this usurious? Is not the security void, by the first section of the statute? Would it be any answer to the defence of usury, that the borrower did not agree to pay the 8 per cent.? that there was no corrupt agreement; and, therefore, that the security was not void, but good? Would it lie in the mouth of the lender to say to the borrower, "True, sir, I took for the loan of my money over 7 per cent. but you did know it at the time; therefore you did not agree to pay over 7 per cent. and, therefore, my security is good?" This is, in substance, the language of those who would urge the necessity of our proving a corrupt agreement, for the purpose of making the security void. According to this, "if the borrower had known the fact, that that he was paying over 7 per cent. then the security would be void; but because the lender had taken the excess in a secret manner, the transaction is not corrupt, and the secu-

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rity is good. But does not the borrower agree to pay the usury? He agrees to pay, and does pay the sum demanded for interest. Is not here, then, an agreement on the part of the borrower as well as the lender, provided any such agreement was necessary? If I am not correct, the lender is permitted to say to the borrower, "because the corruption is all on my side; because I have clandestinely taken from you over 7 per cent.; therefore I am to be put in a better situation than I could have been, provided I had acted openly and fairly." The plaintiffs appear with an ill grace to allege the ignorance of the borrower. Whether he was ignorant that the plaintiffs were taking over 7 per cent. does not appear, and the plaintiffs can never be permitted to make the allegation.

It has been said, that the bank did not intend to violate the statute of usury, and, therefore, the security is not void. If a bank, or an individual, will adopt *a mode of calculating interest* by which they get over 7 per cent. they can never allege a want of *intent*, on their part, to violate the statute. If they will adopt *a mode of calculating interest* which is illegal, they must be responsible for the consequences; for ignorance of law will excuse no man. The very adoption of such a mode is, in law and in fact, evidence, and that conclusive too, of an intention to violate the statute, as well as of a corrupt agreement.

(s) 9 Mass.
Rep. 49.

I refer the Court to the *Bank of Maine v. Butts*(s) for the purpose of showing what was there regarded as conclusive evidence of a corrupt agreement. The defence in that case, was usury; and the plaintiffs put their right to take the sum which they had received for interest, on the usage of banks. Sewall J. concludes his opinion in these words: "It is probable, that in this case, there was no intentional deviation on the part of the bank, but a mistake of their right. This, however, is a consideration which must not influence our decision. The mistake was not involuntary, as a miscalculation might be considered when an intention of conforming to the legal rule of interest, was proved, but a

voluntary departure from the rate. An excess of interest was intentionally taken, upon a mistaken supposition that banks were privileged, in this respect, to a certain extent. This was, therefore, *in the sense of the law a corrupt agreement*; for ignorance of law will not excuse." It is difficult to imagine expressions more applicable to the case at bar. They are conclusive against the plaintiffs. It is difficult to conceive how the plaintiffs could be mistaken. Yet if mistaken, it was a mistake of the law, which can excuse no man. *In the sense of the law, the taking, under such circumstances, was corrupt.* The opinion in the case of the *Bank of Maine v. Butts*, was given upon solemn argument, by a Court of the first respectability, and although not binding as authority, is entitled, considering the eminent legal acquirements of the members composing that Court, to great consideration and respect. The amount in controversy was sufficient to induce that Court to consider well the grounds of their decision. The opinion of the Court, in that case, undoubtedly received the sanction of the then Chief Justice of that Court, who has justly been styled the Mansfield of America.

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The maxim, *ignorantia legis neminem excusat*, is founded in the clearest reason, and the most evident necessity. Civil society could not possibly exist without it. If ignorance could be alleged in justification, or in excuse for the violation of a law of general application, civil society would be at an end. This maxim is equally applicable to criminal as to civil jurisprudence. Blackstone says, (a) if a man thinks that he has a right to kill an excommunicated person, and does kill him, he is guilty of murder; for ignorance of law can never be alleged as an excuse, even in a criminal proceeding. The intention to kill was not more evident in the case put by Blackstone, than the intention, on the part of the bank, to take this interest. If the allegation of ignorance could not avail, in the case of murder, *a fortiori*, it ought not in the case of usury. The plaintiffs in this case intended to do every thing which *the law* makes necessary to constitute the offence of usury, and yet allege their innocence. They intended to get over 7 per cent. for interest on their loans, and then protect themselves by an allegation,

(a) 4 Bl
Com. 26.

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that they did not intend to be guilty of usury. If such pretences can avail them, the whole system of legal government is subverted.

Usury or not, say the plaintiffs' counsel, is a question of intent. In this we agree. How is this intent to be ascertained? Did the lender intend to take over 7 per cent. for interest? is the inquiry, in all cases. If he did, then is there an end to the question of usury. This is a matter of fact, to be submitted to a jury, and if the jury find that the excess was taken for interest, the security is void. If they find that the excess can fairly be referred, in the transaction, to something else besides interest, then the security is not void, because over 7 per cent. has not been taken *for interest*. It is proved, in this case, that it was, and that, too, *intentionally*; and the only question is, whether such an act is usury? This is a question of law; or, in other words, what does the statute to prevent usury say a man may take for the forbearance of a loan of money?

(b) 1 Bos &
Pull. 151

In *Hammett v. Yea*, (b) the question was, whether the transaction was usurious. The lender had gotten more than at the rate of 5 per cent. and whether the excess was to be called interest, or whether it could be fairly referred to something else, as remittance, was the question. The Chief Justice commences by saying, "I will begin with stating my assent to the proposition, that when a party on a contract for a loan intentionally takes over 5 per cent. per annum for the forbearance of that loan, he is guilty of usury. But I add to this the further proposition, that whether more than 5 per cent. is intentionally taken upon any contract for such forbearance, is a mere question of fact for the consideration of the jury, and must always be collected from the whole transaction, as it passed between the parties." If the jury had found that over 5 per cent. was *intentionally taken for interest*, then, according the opinion of Chief Justice Eyre, the transaction would have been usurious. Now the very fact which it was necessary there for the jury to find, is here proved by the clerk of the *bank*.

Will it be pretended, that the plaintiffs have not intentionally taken this \$1809, when it is proved that they have been in the habit of taking interest in the same way, upon all

their discounts, since 1812; and when all the calculations have been made according to the directions of their cashier? Will it be pretended, that any part of this \$18 09 is referrible to any thing else besides interest, when their clerk swears that it was taken for interest, and when, on the trial, they contended that they had a right to take this sum as interest? Chief Justice Eyre goes on to say, "If there be any overplus after the 5 per cent. taken for discount, whether this overplus be referrible to some lawful collateral consideration or not, is a question of fact for the jury." In this case the Court considered the discounting of the bills, and the remittance of the money, as separate and distinct transactions; that is, the 5 per cent. is paid the banker as discount, and the excess as a compensation for the remittance of the money to London; and, therefore the transaction was not usurious.

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Marsh v. Martindale.(c) In this case the jury found, that the plaintiffs did not intend to be guilty of usury. Lord Alvanley, Ch. J. says, "I stated to the jury, that if a man agree to take over 5 per cent. for the forbearance of money, *the law* declares such an agreement corrupt, within the meaning of the statute of Anne, *whether the party thought, at the time, that he was taking usury or not.* The finding of the jury does not prevent the Court from inquiring into the transaction, and declaring it corrupt, if it be so in point of fact." In this case the Court, believing the transaction usurious, pronounced it so, contrary to the finding of the jury. According to the opinion in this case, it is of little consequence what the lender thought about the purity of the transaction, provided it is in law corrupt. All the authorities agree in this, that whether the lender intend to take *over the legal rate of interest*, is a question of fact for the jury. Yet if the jury should find contrary to law, declaring that not usurious which in law is clearly so, the Court will set aside that finding.

(c) 3 B. &
P. 153.

The law, then, has fixed the intent with which a man acts, who takes over 7 per cent. for interest, deliberately and knowingly. The case explains the manner in which the excess was obtained; by calling a year 360 days, and a month 30, in all their calculations. Shortening the time

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raises the rate; and it would be as legal for the plaintiffs to make all their calculations at 8 per cent. as to call less than 365 days a year. All commercial transactions prove the year to contain 365 days, and all banks, when they wish to protect a note payable one year after date, consider the year as containing 365 days. The statute of usury speaks of taking £7 for the forbearance of £100 for one year, and so for a longer or shorter period. The legislature, when they regulated the rate of interest, had no reference to interest for months. The only true way of calculating is, to consider any number of days less than a year, as parts of a year, and take interest accordingly. A month, in the commercial transactions of this country, contains either 28, 29, 30 or 31 days, and this inequality of days in a month clearly shows the impropriety of our calculating by months. Suppose a note payable one month after date, and dated 10th of February: according to the practice of the Utica bank, they would get the interest for 38 days, when the borrower had the use of the money for 31 days only; there being 19 days in February and 13 in March, including the days of grace. In this way, the public are compelled to pay at the rate of 7 per cent. per annum, when the money is loaned only for 365 days. Suppose a note payable six months after date, is discounted at the bank of Utica; when is that note, according to the law of the land, to be protested for the purpose of fixing the endorses? on the 13th, 6th or 7th day, as the months may be, including the days of grace? If we consider 195 days as a part of 365, as by law I contend we are bound to do, the interest of \$1000 for the time is \$35 37. If the calculation is made 36 days to a month, according to the practice of the plaintiffs, it amounts to \$35 98, and is made up by a perfect contradiction of the principle upon which they proceed, when they calculate time for the purpose of protesting this same note.

The plaintiffs, on the trial of this cause at the circuit, in justification of their practice, offered to prove the usage or custom of banks. To the introduction of this evidence, the counsel for the defendant objected; but his honor the presiding Judge admitted the evidence subject to the exception. This Court are, therefore, called upon to say whether this

proof of usage or custom is legal, and whether sufficient was proved, and in a proper manner, to justify the plaintiffs.

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This practice of the plaintiffs is either justified by the *lex mercatoria*, or custom of merchants, or by a usage which is proved by the clerk of the bank to have prevailed for 9 years among a certain set of men, and which this Court is now called upon to sanction.

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What, then, is the *lex mercatoria*, and how is it to be proved? According to Blackstone,^(d) it is a particular system of customs, used only among one set of the king's subjects, "which, however different from the rules of the common law, is yet ingrafted into it and made a part of it; being allowed for the benefit of trade, to be of the utmost importance in all commercial transactions. For it is a maxim of law, that *cuiuslibet in arte credendum est*." The law relating to bills of exchange, and all mercantile contracts, are as much the general law of the land, as the laws relating to marriage or murder. The *lex mercatoria*, or law merchant, is part of the common law of the land.

(d) 1 BL.
Com. 75.

In one case,^(e) the question was, whether a bill of exchange payable to order, becomes negotiable, and may be endorsed over, without the word *order* in the endorsement.

(e) *Edie v The East India Company*,
2 Burr. 1216.

On the trial at *nisi prius*, Lord Mansfield permitted the defendants to prove the usage of merchants in such a case. Witnesses were sworn on both sides. The jury found a verdict for the defendants. The plaintiffs moved for a new trial, and alleged that the proof of usage of merchants ought not to have been received, because the law was already settled. Lord Mansfield, in giving his opinion, on the motion for a new trial says, "since the trial, I have looked into the cases and thought much about it, and am clearly of opinion, that I ought not to have admitted any evidence of the particular usage of merchants in such a case. Of this I say I am now satisfied, for the law is already settled." He says further, "the point now in question, has already been solemnly settled both in the King's Bench and Common Pleas, by two adjudications; and, therefore, witnesses ought not to have been called after such solemn determinations of what the law was." Dennison and Foster, Js. concurred, for the

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reasons expressed by Lord Mansfield. Mr. Justice Wilmot said, "the custom of merchants is part of the common law of England, and courts of law must take notice of it as such." He further adds, "if there be a doubt about the custom, it may be fit and proper to take the opinion of merchants thereupon; yet that is only when the law remains doubtful." "Therefore," he says, "these *judicial determinations* of the point are the *lex mercatoria*, as to this question, for they settle what is the custom of merchants, which is the *lex mercatoria*, which is the law of the land. But this finding of the jury is directly contrary to the *lex mercatoria*, which is so fully settled and established by legal adjudications." The law merchant is, therefore, a part of the common law, and in order to ascertain this law, we always resort to legal decisions.

If a question respecting the law merchant has once been established by judicial decisions, these are the only evidence which Courts receive of what the law is. Any other practice would be derogatory to Courts, by rendering the wavering and unstable opinions of individuals, of greater weight and authority than the solemn and deliberate opinions of judicial tribunals.

What, then, is the custom which the plaintiffs seek to establish? They say that they have always considered a month as 30 days, and a year as 360; and they say that they are justified in this by the usage or custom of banks. All judicial determinations, from the earliest cases, settle the law, as applicable to bills of exchange and promissory notes, that a year contains 365, and a month 28, 29, 30 or 31 days. The law on this subject is fully established by judicial determinations, and, according to the opinion of Lord Mansfield, in the case of *Eddie v. The East India Company*, (f) no proof of usage was admissible. Can it be pretended that a year is of one length when they wish to calculate interest, and of another and different when they wish to fix an endorser by protest? And is the same law merchant to bear them out in these two conflicting pretensions? This is the practice which the plaintiffs gravely ask the Court to sanction, and entail upon posterity, in opposition to the known and estab

(f) *Id.*

lished law of the land regulating time, and in the teeth too, of a statute of usury, which speaks a language too plain to be misunderstood, and whose provisions are too salutary to be disregarded.

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Custom or usage may be proved for the purpose of showing that the excess, if any, was not taken for interest, but as a compensation for remittance, commissions, &c., not for the purpose of justifying the taking over the rate fixed by law. No usage can justify this,^(g) any more than it could control an express contract.^(h)

^(g) Ord on Usury, 58, 59, 60, 61. *Dunham v. Gould*, 16 John. 367. *Grisling v Wood*, Cro Eliz. 85.

^(h) *Yeats v. Pim*, Holt's N. P. Rep. 95.

⁽ⁱ⁾ 16 John. 367.

In the case of *Dunham v. Gould*,⁽ⁱ⁾ the Chancellor in giving the opinion of the Court, says, "It is perfectly idle to talk of a custom of merchants to take a commission above the legal rate of interest, on the exchange of notes. Custom of merchants is not applicable to such a case. It is not matter of trade and commerce within the law merchant, and if there were such a local usage in New York, it would be null and void, and could not be set up as a pretext or cover to trample down the law of the land. The money lenders throughout the country might as well set up a practice of their own, and then plead it in bar of the statute." If the practice of the plaintiffs is adjudged good, then the practice of six or eight banks in this state will, in effect, be pleaded in bar of the statute. They will be permitted to trample down the law of the land. Lord Loughborough,^(j) says, that the custom of trade to take over five per cent. (or the legal rate of interest of England) cannot authorize a greater demand than five per cent.

^(j) *Ex parte Aynsworth*, 4 Ves. 678.

The language of Lord Mansfield, used in the case of *Jestons v. Brooke*,^(k) when speaking of the case of *Floyer v. Edwards*,^(l) will not warrant the idea that usage, be it ever so constant, would justify the taking of *usury*; on the contrary, he expressly says it will not. The inquiry in the case of *Floyer v. Edwards*, was, whether the transaction was a borrowing and lending, and in this view the usage was taken into consideration.

^(k) 2 Cowp. 796.

^(l) 1 Id. 112.

In one case,^(m) the defendant undertook to set up a custom in Southampton, that a pound should be 18 oz. The statutes of England having fixed the pound at 16, Lord Ken-

^(m) *Noble v Durrell et al.* 3 T. R. 271.

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(n) 4 T. R.
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yon says this custom cannot be supported. Among other things, he says, "as well might it be contended that a custom could prevail in a particular place, that a certain number of days less than seven should constitute a week." *Rex v. Major*, (n) was a conviction on the 23 Car. 2, for buying corn on the 23d July, 1791, at Newport, in the Isle of Wight, different from the Winchester bushel. It appeared by the evidence set forth in the conviction, that the corn was bought by the customary measure used in the Isle of Wight, which contains a pint more than the Winchester measure. The defendant was convicted in the sum of 30s. and £10 15, the value of the corn. The Court, notwithstanding this strong proof of usage or custom, sustained the conviction. In this case, too, it appeared that subsequent acts of parliament, requiring the return of corn, had noticed the custom, and required the return according to such customary measure. It was contended that these subsequent acts had repealed the statute, 22 Car. 2, and justified the custom. Lord Kenyon held otherwise, and said, "we cannot get rid of these positive statutes." In *Rex v. Arnold*, (o) the buyer in Huntington, was convicted of purchasing corn different from the Winchester measure. Lord Kenyon refers to this custom of farmers, which existed in many parts of the kingdom, and regrets that their obstinacy should have prevented the operation of the statute of Charles the 2d. The defendant was convicted, notwithstanding the proof of custom. These are strong and conclusive authorities to show that a custom however well proved, or however prevalent, cannot be set up in opposition to the law of the land.

(o) 5 T. R.
353.

(p) 1 R. L.
376, 379, n. 12.

In most countries, guards have been provided by law, against impositions upon community, in the use of false weights and measures. This is highly penal in our own state, (p) and the offender, in public estimation, is justly considered infamous. Courts of justice have always been rigid in enforcing these statutes, inflicting punishment for the most trifling violation. Why was this? The reason is obvious; because weights and measures are of constant and daily use in our dealings with one another, and because the frequent use of the same false weight or measure would

enable its possessor to commit extensive injury upon his customers. That the variation is small, while it manifests a meanness in depravity, has a tendency to shield the offender from punishment. The injury becomes great by repetition. An extensive merchant, by little and little, filches property from his customers, by the use of false weights and measures. What would Courts of Justice say to such a merchant, who, when indicted should, as the plaintiffs have done in this case, plead the extensiveness of the practice. Would they not say, that "*the law, and not the practice of others is to be your guide, and what you offer in justification shows, if true, the necessity of an immediate corrective.*" For the purpose of showing what usages are good, and how far they are to operate when proved, and the manner of proving them, I refer the Court to the cases of *Thomas v. Graves and Toomer*,^(q) *Same v. O'Hara*,^(r) *Cotton v. Johnson*,^(s) and *Trott v. Wood*.^(t) Errors merely acquiesced in, do not constitute the law. In *Leach v. Par-giter*,^(u) the practice under the Lord's act, had been one way for 30 years, but was altered the first time the statute came under the consideration of the Court.

In *Butt v. Conant*,^(v) speaking of usage, Dallas, Ch. J. says, "if the practice were against the first principles of constitutional law, and an evident encroachment upon the rights of the subject, I would go even the length of saying, if it were of this description, and were sanctioned by the expressions of one of the Judges, in such a case I would not hold it to be law if it had existed from the foundation of Rome."

A custom contrary to public good, or injurious to a multitude and beneficial only to some particular persons, is repugnant to the law of reason, and consequently void.^(w) The Judges say, in things against law and reason, *usage* is to no purpose.^(x) Customs ought to be beneficial to all, but may be good when against the interests of particular persons, if for the public good.^(y) A custom that begins by the extortion of lords of manors, is judged wanting a lawful beginning, and therefore void.^(z)

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^(q) 1 Rep.
Con. Court of
S. C. 308.

^(r) Id. 303.

^(s) 3 Salk
110, 111.

^(t) 1 Gall
Rep. 443.

^(u) Doug. 68

^(v) 1 Brod
& Bing. 548

^(w) Danvers,
421, 427.

^(x) Plowd
170.

^(y) Dyer, 60

^(z) Plowd
332. Dyer, 199

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(a) 4 T. R.
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The case of *Rex v. Major*, (a) also shows that statutes passed after the existence of the custom or usage is known, and in some measure sanctioning them, by authorizing returns according to the custom, do not affect a general law in relation to the same subject. If the legislature knew, at the time they incorporated the plaintiffs, that banks were in the habit of calling 360 days a year, when calculating interest, this case shows that such a circumstance will furnish no argument for exempting them from the operation of a permanent and plain law of the land. In the language of Ld. Kenyon, they cannot *get rid* of the operation of such a positive law as the statute of *usury*. The convictions under the corn laws, were upon penal statutes, where the utmost strictness is observed in construction, and the greatest latitude allowed in defence. They go to prove, beyond all controversy, that, on an indictment, against a natural person, the facts shown in this case would ensure his conviction.

The Court will find, if they examine the acts incorporating the different banks in this state, that most of them are restricted in their discounts, to six per cent. and those in the city of New York, which are not so restricted, usually confine themselves to that rate, otherwise they could not do business. Now a bank that takes at the rate of 6 per cent. may call any number of days less than 365 a year, and calculate interest accordingly, provided they do not get over 7 per cent. The undoubtedly violate their charter, but are not guilty of usury.

It may be supposed, that the amount received was too trifling for the notice of a Court of Justice, and that judgment would therefore be given for the plaintiffs. I will not for a moment entertain the idea that such a supposition is correct. The statute of usury must be protected from the most trifling violations, or not at all. The legislature have set bounds to the unfeeling and avaricious lender, which he is not to pass with impunity; and that Court is guilty of treachery to the public, that does not confine him within legislative limits. The Judge would ill deserve a seat upon the bench of justice, who should let his decision be at all influenced by the amount which the violator of the statute

had received. If 26 cents can be received upon the statute with impunity, so can 26 dollars, and there is nothing to be done by a Court of Justice but rigidly to adhere to the rate fixed by statute. In the case of *Rex v. Major*,^(b) the difference between the two measures was trifling, and yet no one ever thought of urging that as an argument in favor of the defendant's acquittal. I challenge gentlemen to point out a case where the amount received has ever been taken into consideration, for the purpose of deciding whether the transaction was usurious. If the amount exceeds the rate fixed by statute, it is usurious; no matter how trifling the excess. The cases authorizing the taking of interest in advance, may be cited for this purpose. I was aware of the case of *The Manhattan Company v. Osgood*,^(c) cited on the other side, and I am also aware that that decision is not supported by the authorities relied on. Yet if that case is introduced for the purpose of showing that the violations of the plaintiffs are to be sanctioned, it proves too much; for we then have no statute of usury at all; and if this is the extent to which that decision is to lead, I trust this Court will pronounce it not law.

Something has been said, and more probably will be, in regard to the consequences of a decision against the plaintiffs. This is an argument seldom resorted to when other substantial grounds can be taken. It is generally the last, and with parties situated like the plaintiffs, the most desperate effort. Such arguments, however, can never assist any person in arriving at the truth. In the case of *Waters v. Stewart*,^(d) Chief Justice Spencer, in giving his opinion in the Court of Errors, says, "arguments *ab inconvenienti* have been suggested. There can scarcely exist a case, however well settled, where such arguments cannot be urged. They prove nothing, and should be listened to only in *doubtful cases*." In the case of *Langdon v. Potter and others*,^(e) Chief Justice Parsons says, "arguments drawn from inconvenience, are to have weight only in *doubtful cases*." In the present case nothing is doubtful.

Private statutes, made for the accommodation of particular citizens or corporations, ought not so to be construed as

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(b) Id.

(c) 15 John.
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(d) Caines'
Cas. Err. 66.

(e) 3 Mass
Rep. 593.

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 Bank of Utica to affect the rights or privileges of others, unless such construction results from express words or necessary implication. (f)

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(f) Coolidge
 v. Williams, 4
 id. 145.

It may be well, perhaps, since arguments *ab inconvenienti* have been used for the plaintiffs, to turn the attention of the Court, for a moment, to the consequences of a decision against the defendant. The plaintiffs by calling 360 days a year, have, ever since their incorporation, made every 73d dollar of discount over 7 per cent. The only true way of testing the operation of any practice is, by viewing its consequences for a long course of years, and for the purpose of showing this, I have made a calculation, giving its effect upon one million of dollars for a century. By this calculation it will appear, that in a century, over twelve millions of dollars will be illegally taken. This makes an annual average of 120,000 dollars. The circulating medium of the United States is probably not far from 150,000,000. The amount of the annual average which would be thus illegally taken, upon the principle contended for by the plaintiffs from the whole United States, over and above 7 per cent. would be 18,000,000. The inconsiderable sum which will probably be lost by a judgment against the plaintiffs, compared with the enormous tax which will certainly be entailed upon community by a contrary decision, sinks into utter insignificance. The amount which will be lost to the plaintiffs, will, in all probability, fall far short of what they have illegally taken; and it is of immense importance to a growing commercial country like ours, that questions of this sort should be settled upon true principles. If we were compelled to make our loans from foreigners, upon the principles contended for by the plaintiff's counsel, the effect would be utter destruction. In a very short time the whole wealth of the country would be exhausted by such illegal exactions. Compared with such a state of things, the paltry tax upon tea, which contributed to produce the revolution, would have been insignificant indeed. The restrictions against usury are founded on the strongest reasons of policy and morality; they have, therefore, been imposed in almost every age and country. It is no law of doubtful policy or ex

pediency which you are called upon by the defendant to enforce. It is a law which the greatest and the best of Judges have felt bound to watch with unceasing vigilance, guarding its provisions from the most trifling infractions, and enforcing its penalties fearless of consequences. It is a law which our very nature renders necessary, and which has been hallowed by the sanction of accumulated ages. It is not like some exploded edict of despotic power, preserved as a pretext for plunder and oppression. It is one of the few restraints which, in the most corrupt times, have always been placed, even by the very worst rulers, upon the rapacity of the worst part of community, for the protection of the poorest. It is prohibited by the common law, and the punishments inflicted for its restraint have been rigorous and severe. It is laid down in the books as a sound rule of construction, and in some cases by legislative enactment, that the statute shall, in all cases, be construed most strongly against the usurer. Though the borrower was formerly considered a *particeps criminis*, that idea is now justly exploded, considering that he is in the power of the lender, and necessarily submits to his terms. The desire of gain insensibly vitiates the heart. It was, therefore, wise for governments to erect a shield over the weaknesses, and a check upon the passions of men, to protect those oppressed with pecuniary embarrassments from the depredations of unfeeling avarice, and to guard weak and unfortunate individuals from the fangs of the Shylock. All privileged associations should be watched with Argus eyes. They should be regarded with distrust. It is the duty of Courts to keep them within the bounds prescribed by the legislature. They are opposed to the genius of our government, and if tolerated, should not be permitted to abuse the privileges with which they are entrusted.

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These considerations apply with peculiar force to incorporated banks. Drawing around them, as they evidently do, a silent yet powerful influence in the neighborhood where they are situated, they will ever be watched with jealousy by a people alive to their rights and liberties. Banks being granted for the express purpose of loaning mo-

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ney, the rule of construction of the statute of usury will not be softened in their favor. If the principle contended for by the opposite counsel be correct, what salutary statute can hereafter stand against the usages of trade? What law can hereafter be enacted, which may not be trodden down by the custom of banks.

D. Cady, in reply. It is certainly well settled by the authorities cited in the opening, that to constitute usury, so as to avoid the security, there must be a corrupt agreement. No case has been produced to the contrary. If this be necessary, then, in order to constitute the offence with which we are charged, we must have had an associate. It is difficult to conceive how there can be a corrupt agreement, without there being two parties. These are essential to every contract. Who is the person with whom we have made the corrupt bargain charged upon us? Not the defendant. He disavows it. It is denied that he knew any thing of the usury, till some time after the note in question was discounted; and his counsel complain that he has been practised upon from the beginning, without knowing any thing of the imposition. All is a recent discovery.

Now I propose to show conclusively, that there never was a case of usury without the concurrence of two parties.

(g) 3 Day's
Cas. 26.

Smith v. Beach, (g) is a respectable authority to this point, and will be found to accord as well with the spirit of all the cases, as with reason and common sense. The point there directly decided, was that a corrupt agreement, in which the minds of the parties meet, is necessary to constitute usury; and, therefore, where more than lawful interest was reserved, with the knowledge of the lender, but without the knowledge of the borrower, it was held that the transaction was not usurious. The reasoning of the Court is directly applicable to this case, and, if it be law, is conclusive in favor of the plaintiffs. "A corrupt agreement (they say) is essential to constitute usury; and, to form a corrupt agreement, as in all other contracts, the minds of the parties must meet. The assent of Beach (the defendant) was, therefore, as essential to the existence of an usurious agreement.

as that of Bird, (the plaintiffs' testator.) From these premises it follows, as an undeniable consequence, that there could be no corrupt agreement, while either of the parties remained ignorant of the excessive reservation; and the jury ought to have been so instructed." It will be seen, by that case, that the Connecticut statute is the same, in substance as our own. The same arguments were urged as here, against the necessity of a corrupt agreement. It was said to be enough that the lender voluntarily made an usurious reservation; and of the fact that he did so there was no dispute: but the law was denied by the Court. The ignorance of the borrower precluded the possibility of an agreement.

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The several provisions in the 1st and 2d sections of the statute of usury, (h) show, that the distinction between the two cases, of a corrupt agreement and the receipt of excessive interest by the lender without the concurrence of the borrower, was intended to be kept up by the legislature. The 1st section provides for the case of taking excessive interest for the forbearance of money, or reserving it by certain contracts or securities. If so taken or reserved, the contract or security is declared void. The contract itself is vitiated by the corrupt agreement. The second section was intended to provide for taking usurious interest, in the same way, and it gives the remedy. Within one year the borrower may recover back the excess. If not knowingly paid, the statute could never have intended to confine him to the year. If ignorantly paid, he has the six years, and might recover it back, upon the general principle, that it was money paid through mistake or fraud. It stands on the same footing as money twice paid on a note by mistake. Suppose an illiterate man to borrow \$100, and the lender fraudulently draws, and procures him to sign a note for \$105. This would not be void for usury, but for fraud; whereas, if the lender should say, I must have \$105, and the borrower then should sign a note for that sum, it would be void for usury. If gentlemen are willing to abide by their own admissions, the case is against them. They are loud in urging the entire ignorance of their client that any excess was de-

(A) 1 R. L.
64.

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manded ; and, indeed, this is plain from the proof, if the concession had not been made. The defendant never thought of an usurious contract. It was made out by calculation and inference. The note is presented and the money received, silently, in the ordinary course of business, without dreaming of usury. Neither Maynard nor Spencer were authorized to part with the notes at an usurious rate of discount. The circumstances under which the second note was discounted are not explained ; but, as to the first and second, both parties agree that the defendant acted unwittingly. If the agent had sworn that he paid \$40 excess, without knowing what he was about, it might have been recovered back within 6 years, in an action for money had and received, upon general principles, but the note would not be void for usury.

The first counsel for the defendant conceded, that if the second note was valid, we may recover for that. If void, we may go for the first, if that be good. Upon the latter, it is said we took interest for three days, which it had already run when presented for discount ; but was it not, to all legal purposes, discounted on the 12th of September. It was carried for discount on that day, and on an objection being made to the form of the note, another was afterwards substituted in an acceptable shape, which was actually discounted upon the 15th. The money was, then, virtually set apart for this purpose upon the 12th. There was a proposition to do it, which was afterwards executed. Take the case of a request for a loan in the morning, and the money laid apart for the purpose, but not actually counted out till the next day, when the loan is completed : would it not be iniquitous to object usury ? The Court are called upon to presume what the contract was ; for none of an usurious nature is shown ; and they will not make a presumption which shall involve the party in guilt.

(i) *Lansing*
v. *Gaine &*
Ten Eyck, 2
John. Rep
300.

But what is the legal date of a note ? It is the time of delivery.(i) This was on the 15th of April, when a discount for 90 days was rightly taken ; for it had that time to run. Had an action been prosecuted before the expiration of that time, it would not have lain. The Court would rather presume this to have been the contract, than impute the crime

of usury. Suppose the note had been ante-dated a year, by mistake, and the discount for a quarter taken. The Court would still say to the holder, "your engagement was to wait the 90 days, for which you may take the discount; but cannot sue before the expiration of the time."

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It is said, that our miscalculation was intentional; but this is not necessarily so. Will the Court presume it? The division of time is of human invention; and there is no such absolute certainty and plainness in measuring, as to preclude mistake. We are told that the statute speaks of a year, or a longer or shorter time, and that quarters and months are not taken into account; but we are not informed what operation to adopt, in order to reach the law of less than a year. You divide 365 days by 12, if you are seeking for a month, and reject the fractions. This gives a quotient of 30, which multiplied by 3 gives 90 days, or a quarter of a year, if fractions are still to be disregarded. Upon this principle, on a 60 day's loan, you get the interest for a year, and divide by 6.

But suppose 90 days are improperly called $\frac{1}{4}$ of a year: on looking at the calculation, the Court will see that the interest is calculated for 90 days, excluding the first or day of the date, which was also the day of the lending; so that, in truth, the only question is, whether the lender is entitled to interest on the day upon which he loans the money. Is it to be tolerated, that we are to forfeit our security for the whole sum, merely because we have charged interest for the first day? Will the Court say, that because the calculation happens to cover that day, that so small a mistake, even if it be one, shall overturn the whole demand? But is it a mistake? Every law book, speaking of time, tells us that fractions of a day are to be rejected. This is an established general rule, and only to be departed from when it becomes material to inquire beyond it, upon principles of necessity, or for the sake of equity. Are we to be stigmatized as usurers on such a ground as this?

It was not our fault that we discounted the second note before the first had run out; though be this as it may, it could not change the character of the first note. But such a transaction is not usury, even if it is to be deemed a con-

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(j) 4 T. R.
148.

(k) Id. 153.

tinuation of the first. The party was under a necessity of obtaining a discount of his note thus early, in order to comply with the course of business which is universal at the banks throughout the commercial community. It was in reference to the discount days, which cannot be so regulated as to meet the views of individuals. Upon the question coming up in *Brown v. Harraden*,^(j) whether 3 days of grace are to be allowed upon a promissory note, Ld. Kenyon gives great influence to the universal practice which prevailed on this subject. He says,^(k) "in addition to these considerations, we are now told that it has been the constant practice at the bank, and at the principal bankers, to make this allowance on promissory notes. Then, if we were to make a decision in opposition to all this practice, it would be attended with the most serious consequences; for these notes are circulated not only throughout this country, but also over several other countries of Europe. Many of them have been discounted, and interest taken, on the supposition that 3 days of grace are allowed. But if we were to determine that no such allowance ought to have been made, all those parties would be involved in the crime of usury."

This case goes, moreover, to show the weight which is given to arguments *ab inconvenienti*, upon these commercial questions. The consequences, to be deprecated are, the overthrow of floating paper, which has always been supposed to be good, and the involving thousands of innocent men, who never dreamed that they were taking excessive interest, in the crime of usury.

We accede the distinction made between mistakes of law and mistakes of fact. Knocking a man down in the street, or shooting at him, and taking his life, will constitute murder, whether the offender knows that it comes within the legal definition of this crime or not. But the two cases of *Brown v. Harraden*,^(l) and *Glassford v. Laing and others*,^(m) furnish a complete illustration of the distinction between a mere mistake of the law, and the one insisted upon in this case. We claimed the right to have the first day upon each note included. This is the mistake, if it can be called one

(l) Id.
(m) 1 Campb.
Rep. 149.

We intended no more than 7 per cent. for the whole time ; and the mistake of including the first day was one of fact merely.

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Floyer v. Edwards,⁽ⁿ⁾ was cited in order to show that the intention of the parties is material ; that they must both concur in the bargain ; and the *Maine Bank v. Butts*,^(o) with the same view. No mistake, in these cases, was pretended. There could be none. The latter was of notes palpably usurious. It was the case of taking two distinct notes for the same money. A note is taken, say for the principal, at three years : other notes are taken for a part of the same sum, at the same time, at shorter dates. This is the case of the *Maine Bank v. Butts*, yet the question of intention was left open to be referred to a jury ; and that question is always involved, where a party is on trial for a crime. There are certain offences to which knowledge is essential, and must be averred in an indictment. The crime of passing counterfeit money is one. Usury is another. The intention of the parties is here the gist of the inquiry, and must always be left for the jury to pass upon. A man takes 8 per cent. ignorantly : unexplained, it would be usury. If shown to have been accident, it would be otherwise. Thus, even in the *Maine Bank v. Butts*, the act of taking the smaller notes was open to explanation, and the *prima facie* case, made out by the defendant, might have been done away, by proof on the other side.

⁽ⁿ⁾ Cowp.
112. Loft,
596, S. C.
^(o) 9 Mass
Rep. 49.

It is complained, that our calculations were made in secret ; that the business was so managed that they could not be comprehended by the borrower. But what ought the Court to infer under all these circumstances ? Here is plainly room for mistake. What should the presumption be ? *Glassford v. Laing and others*,^(p) and *Buckley v. Guildbank*,^(q) are strong cases to show that where the Court can infer a mistake in taking the excess, they will do it, in order to avoid imputing the offence of usury. Taking a trifling excess beyond the legal interest, according to an extensive practice among money lenders, is a subject also of this rule of presumption in favor of innocence. "Thus, Lord Mansfield, in *Floyer v. Edwards* :^(r) "Upon a nice calcula-

^(p) 1 Campb.
N. P. Rep. 149
^(q) Cro. Jac.
678.

^(r) 1 Cowp
115.

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(s) 15 John
162.

tion it will be found, that the practice of the bank in discounting bills, exceeds the rate of five per cent. for they take interest for the whole time the bills run, but pay only part of the money, to wit, by deducting the interest first; yet this is not usury." *The Manhattan Company v. Osgood*, (s) was decided upon the same principle.

If gentlemen object to our rule of calculation, they ought to have supplied us with a better. The practice of calling 60 days $\frac{1}{4}$ of a year, in calculating interest, has prevailed for a great length of time; and, with a perfect knowledge of this practice, it will be seen that almost every act for incorporating banks refers to 60 day notes. Being the most usual kind of bank paper, and understood in the long continued practice of the commercial world to mean $\frac{1}{4}$ of a year, is it too much to say that the legislature referred to them in this character? Indeed, they are, as we have shown, in fact, $\frac{1}{4}$ if you take them as the aliquot part, and reject the fraction.

It was not usurious to discount the 2d and 3d notes before the ones for which they were substituted fell due. If there had been an original express agreement to this effect, it would have been another question; but the existence of any such agreement is negatived by the proof.

SUTHERLAND, J. The note on which this suit was brought, bears date the 14th of March, 1821, and is payable in 90 days after date. It was presented at the bank, on the 15th: \$18 09, paid as the discount and interest upon it. It fell due on the 15th June. The interest was calculated as in the case of the *New York Firemen Insurance Company v. Ely & Parsons*, (a) upon the principle that 90 days were the fourth of a year. This note was the second renewal of one, dated the 12th of September, 1820, and discounted by plaintiff at 90 days. The interest was calculated upon the same principle, and the same amount received upon this and the second as upon the last note.

(a) Ante, 678.

It is unnecessary to consider the various points which were discussed in this case. There is nothing to take it out of the operation of the principle established in *The Firemen*

Insurance Company v. Ely & Parsons; that this mode of calculating the interest, renders the transaction usurious.

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WOODWORTH, J. concurred.

SAVAGE, Ch. J. To determine whether a contract is usurious, we must inquire,

1. Whether the subject of the contract is a loan?
2. Whether more than lawful interest has been received or taken? and
3. Whether it is the effect of a corrupt agreement?

In this case, there is no dispute upon the first question. It is denied, however, by the plaintiffs, that they have taken more interest than they were entitled to receive.

The statute is very explicit, that no more than 7 pounds shall be taken for the loan of £100 for one year, and so after that rate for a greater or less sum, or for a longer or shorter time. The sum of \$18 09, was received by the plaintiffs for the loan of \$1000 for ninety-three days, and both the witnesses who have testified on that subject, have sworn that the interest on \$1000 for that time, at 7 per cent. calculating 365 days to a year, amounts to \$17 83 5. The fact is proved, then, that more than 7 per cent. has been received; and there is no pretence that it was taken by way of commissions or incidental charges. The custom, which is said to be universal, for all moneyed institutions, to calculate interest on 360 days as a year, can have no weight. It would be strange indeed, if the practice of any set of men, or companies of men, should become paramount to the authority of the legislature. With respect to most of these banks, who are said thus to calculate, it is well known that their loans are made at 6 per cent.; and although they receive more than six, yet the difference is not such as to amount to a violation of the statute against usury. Hence, perhaps, it is, that the custom has prevailed so generally. The excess amounts to a very little less than one tenth of 1 per cent. To an individual borrower, it is very trifling: to a bank, however, having an active capital of \$500,000, this pittance will produce \$500 per annum, and upon the whole active banking capital of the state, according to the report of the Comptroller, it would produce \$13,000.

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The amount, therefore, is too large to be entirely disregarded, because *de minimis non curat lex*.

Again; it is alleged, that the plaintiffs have received interest for three days more than the true time included in the notes; that is, they have received interest on \$1000 for 279 days; whereas the number of days from the 12th of September, 1820, to the 15th of June, 1821, reckoning one of these days inclusive, and the other exclusive, is 276 days only. So is the fact. The plaintiffs have, therefore, received the interest of those three days, at the rate of 14 per cent. per annum; for the second note was a renewal of the first, and the third a renewal of the second. Yet there is no evidence, showing that when either the first or second note was given, there was any stipulation for their renewal. The Clerk, who keeps the books of the bank, swears that each note was discounted on the day of its date; that on this being done, the proceeds were deposited to the credit of the person for whose use the discount was made; and if he chooses to make a deposit several days before his note falls due, surely the bank ought not to be holden guilty of usury for receiving it, unless the transaction clearly appears to be a cover for usury, as in the *Maine Bank v. Butts*, (9 Mass. Rep. 49 to 55.) In that case, a loan was made of \$10,000, payable part in 2 years, and part in 3 years. It appeared to be the practice of that bank, to take notes payable in 63 days; and a week previous to the expiration of such notes, the borrower obtained a new loan of the same amount with which to meet the former. In that case it seems to have been part of the original contract, that the borrowers of money from that bank should pay interest for 70 days for every loan of 63 days; and there was reason to believe that the interest on the loan to Butts had been calculated on those principles, as the small notes given for the interest, greatly exceeded its lawful amount. It seems to have been supposed by the bank, also, that being authorized by their charter to transact business on *banking principles*, they were, thereby, exempt from the restrictions of the act to prevent usury. Judge Sewall, who gave the opinion of the Court, referring to the practice of renewing a

note several days before its expiration, observes, that, " while each note sustains a discount or deduction at the established rate of interest only, there is no offence against the statute for the prevention of usury." This doctrine must certainly be admitted, with the qualification, that these renewals must not be used as a cover for usury. In the case under consideration, the renewals appear to have been made as near as possible to the time when the previous note became due, having regard to the established days of discount at the bank. Had more than one discount day intervened between the discount of the second note and payment of the first, the transaction would certainly have carried suspicion, at least, upon its face.

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The objection that interest was taken for several days between the date and the discount of the notes, or some of them, does not appear to be supported by the facts. The testimony is contradictory on the subject; but I think we ought rather to give preference to the Clerk of the bank who does not depend upon his memory, but upon entries made in the books of the bank at the time. In this respect we are performing the office of a jury, and ought not to be unnecessarily astute in detecting small unintentional errors, to defeat the recovery of a just demand. In making this remark, I mean not any reflection on the justice or policy of laws prohibiting usury. On the contrary, I believe such laws perfectly just and proper. They are necessary to protect the necessitous against their own acts of indiscretion. Nor would I impute moral guilt to those who receive more than the legal rate of interest, provided their exactions do not become oppressive. Usury is *malum prohibitum*—not *malum in se*. I am aware, that by some ancient English statutes, all usury was prohibited, as being against the law of God, the laws of the realm, and the law of nature. It was tolerated, however, by the law of Moses; and allowed to be taken by Jews from the Gentiles; (Deut. xxiii. 20;) and, therefore, could not have been immoral in itself. The stat. 37 H. 8, c. 9, (A. D. 1546,) was the first statute of England, which permitted interest to be taken;

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and 10 per cent. was allowed. This statute was repealed in 1551; but revived by the 13 Eliz. c. 8, (A. D. 1570,) 10 per cent. was again the lawful interest; and by this act, contracts, assurances, &c. whereby above 10 per cent. should be reserved, or taken for money lent, are made void. In 1623, the rate of interest was reduced to 8 per cent.; in 1660, to 6 per cent.; and in 1713, by the 12 Anne, c. 16, to 5 per cent.

There is nothing in the objection, that interest was taken for the three days of grace; for though the maker might have chosen to pay his note on the day when payable, yet the holder could not compel payment till after the expiration of the days of grace. To every practical purpose, therefore, the days of grace are part of the note itself.

Another objection (handed to the Court among the written points, but upon which we refused to hear an argument) is, that it was usurious to take interest in advance without regard to the rules of rebate or discount.

Were the question upon this practice *res integra*, I should think it a palpable violation of the statute. The bank lends a man \$1000 for a year, but actually advances him \$930 only: the other \$70 they lend to somebody else, and deduct the interest again. But for the purpose of the present illustration, I will suppose the whole \$70 lent. At the end of the year, then, they receive from the first borrower their principal, \$1000; from these second borrower, £74 90; making an excess of \$4 90, beyond legal interest, which on a capital of \$500,000, will produce \$2450. On the other hand, if the borrower puts his \$930 out at interest, he will have at the end of the year, \$995 10 only, with which to pay the \$1000 borrowed. He therefore loses \$4 90; which the bank gains beyond the lawful interest; whereas if they were to retain the *discount* instead of the *interest*, the borrower would receive \$934.58, the interest of which is \$65.42, giving him his \$1000 at the end of the year. The bank, by again lending the discount, (\$65 42) would receive, at the end of the year,

1. The whole amount of the loan, \$1000 00

2. The discount on \$1000,	65 12	NEW YORK,
3. The interest on \$65 42,	4 58	May, 1824.
	<hr/>	<hr/>
Making in all,	\$1070 00	Bank of Utica
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being the sum loaned with 7 per cent. interest. Those banks who lend at 6 per cent. may safely adopt the practice of retaining the *interest* instead of the *discount*; as the difference does not amount to quite half of 1 per cent.; they, therefore, do not violate the act to prevent usury.

Plain as this case appears to my mind, it has been solemnly adjudged not to be usurious, both by this Court, (*The Manhattan Company v. Osgood*, 15 John. 168,) and by the Supreme Court of the United States. (*Fleckner v. Bank of the U. S.* 8 Wheat. 838.) Both Courts found their decision upon the practice of bankers and commercial convenience. Judge Story, in giving the opinion of the Court, (8 Wheat. 354,) observes, that an authority to make discounts, means an authority to receive the interest in advance. The same doctrine has been recognized in Pennsylvania (*Pawling's Exrs. v. Pawling's Adms.* 4 Yeates' Rep. 220, 223;) and in Massachusetts, (*Maine Bank v. Butts*, 9 Mass. Rep. 49.)

The point may, therefore, be considered settled until the legislature alter it, if they should think it proper or necessary; but as the old adjudications were different, it may be matter of curiosity, at least to trace its history. The oldest case which I have found where this doctrine was discussed, is *Barnes v. Worlich*, which is reported in Cro. Jac. 25; Moor, 644; Yelv. 30; Noy, 41; and 1 Bulstr. 20. These reporters disagree in some particulars; but they all concur in the point, that deducting the interest out of the loan, at the time when it was made, would be usurious, because the borrower would not have the use of the whole money for the year. The question before the Court, was, whether a reservation, in the contract, of interest half yearly was usurious; and it was decided that it was not, though some of the Judges thought even that was usurious. This decision took place before the statute of Anne, and in the 43 or 44 Eliz. (about A. D. 1600.) The first case in which I have found a contrary *dictum* is *Lloyd v. Williams*, (2

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W. Bl. 792,) which was an action on the statute of usury for the penalty. The defendant had taken £6,5, by way of advance for £100; and to determine whether the action was brought in due time, the question before the Court was, whether the offence was complete on receiving the £6,5, or not till the final payment of the note. The Court decided that the offence was complete on receiving the £5,5; and Blackstone, Justice, said, "that interest may as lawfully be received beforehand for *forbearing*, as after the term is expired for *having forborne*; and it shall not be reckoned as merely a loan of the balance. Else every banker in London, who takes 5 per cent. for discounting bills, would be guilty of usury; for if upon discounting a £100 note at 5 per cent. he should be construed to lend only £95, then, at the end of the time, he would receive £5 interest for the loan of £95 principal, which is above the legal rate." This case is very fully reported in 3 Wils. 250 to 262, where the latter point is noticed by the Court, who declare that "*Worley's case*," (S. C. as *Barnes v. Worlich*, in Cro. Jac. and other Reporters,) "Moor, 644, shows that taking interest out of the principal, when it is first advanced and lent, is usurious, and contrary to the statute, and 1 Bulstr. 20, upon an information on the 13 Eliz. c. 8, for usury, S. P." It appears that Blackstone, J. was not present when judgment was pronounced. The opinion was given by De Grey, Ch. Justice. This case was decided in 1771; and taking the two reports together, it appears that De Grey, Ch. Justice, and Blackstone, J. differed on the point now under consideration.

The case of *Flayer v. Edwards*, (Cowp. 112,) was next in point of time, being decided in 1774. That was an action for goods sold at 3 months credit, with an agreement that if the money was not then paid, the defendant should pay an half penny an ounce per month, till paid. This exceeded lawful interest; but was decided not to be usurious upon the usage of trade among gold refiners, to which the parties belonged; and Lord Mansfield observes, that, "upon a nice calculation, it will be found that the practice of the bank in discounting bills, exceeds the rate of 5 per cent.; for they take interest upon the whole sum for the

whole time the bills run, but pay only part of the money, viz. by deducting the interest first; yet this is not usury."

The same point is adjudicated in 1787; (*Auriol v. Thomas*, 2 T. R. 52, & *Winch, q. t. v. Fenn*, n. (c) to that case;) and in several cases, subsequent to that time, in which, not only 5 per cent. interest was allowed to be deducted at the time of the loan; but also commissions and other charges, where the nature of the transaction is such as to render them proper. (1 B. & P. 143, and the cases there cited.)

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This privilege of deducting the interest by way of discount, I apprehend, is confined to bankers, and those who deal in bills of exchange or promissory notes, by the way of trade. This is so, at least in England. In *Marsh v. Martindale*, (3 B. & P. 154,) the late plaintiff discounted a bill of exchange payable in 3 years, for £5000, and deducted the 3 years interest, £750. This was held to be usurious upon the authority of *Barnes v. Worlich*, and *Dalton's case*, (Noy, 171,) Lord Alvanley, Ch. J. justifies taking the interest in advance on bills of exchange, which he admits to be more than the legal rate, and adds, "In such cases, the additional sum seems to have been considered in the nature of a compensation for the trouble to which the lender is exposed."

On the whole, therefore, I am of opinion, that the objections to the amount of interest, and the mode of transacting the business of the bank, are none of them tenable except the first, to wit, calculating upon 360 days as a year. This mistake cannot be called involuntary. There is no pretence of ignorance or inadvertence. It is a direct violation of the statute; and if Courts permit moneyed institutions thus to go on making one encroachment upon another, the statute against usury will soon become a dead letter.

That the receiving usurious interest intentionally, is sufficient evidence of a corrupt agreement, does not need an authority to support it.

In my opinion the defendant is entitled to judgment.

Judgment for the defendant.

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THE PRESIDENT AND DIRECTORS OF THE BANK OF UTICA
against SMALLEY & BARNARD.

S. P. as to
usury, custom,
discount, &c.

A transfer of bank stock is valid as between the vendor and vendee, tho' the act of incorporation provide that no such transfer shall be valid or effectual till registered in a book to be kept by the bank for that purpose, and the debts due from the vendor to the bank, &c. shall be first paid.

This clause in bank charters is intended merely for the protection of the bank; i. e. to give them a lien on the stockholder for what he owes the bank, and enable them to ascertain the persons to whom dividends are due.

Till registry, therefore, it seems, they would be protected in a payment of dividends to the person in whose name the stock stands upon the bank books, without regard to any secret transfer.

One who has assigned his stock is a competent witness for the bank having this clause in its charter, without registry, or showing that he has paid, or is not indebted to the bank.

A corporation must prove its existence upon the general issue.

Whether the misnomer of a corporation, who is plaintiff, must be pleaded in abatement, or may be taken advantage of upon the general issue? *Quære.*

In a suit by a corporation, the declaration need not set forth, by averment how they were incorporated.

ASSUMPSIT brought to recover of the defendants, as endorsers, the amount of a promissory note made by one Morse, tried at the Oneidia circuit, the 27th day of May, 1822, before his honor the (the late) Chief Justice Spencer.

The plaintiffs proved the execution of the note by the maker, and the endorsement of the defendants. The note was as follows: "\$1200. Ninety days after date, I promise to pay to the order of Sylvanus Smalley and Pardon Barnard, at the bank of Utica, twelve hundred dollars, value received. Lenox, Nov. 16th, 1820.

Harvey G. Morse."

Endorsed—"P. Barnard,
S. Smalley."

Thomas Calling, a witness called on the part of the plaintiffs, after being sworn in chief, was inquired of by the counsel for the defendants, whether he was a stockholder in the bank of Utica? to which he answered, that he was to the amount of 4000 dollars and upwards. The counsel for the defendants then objected to the competency of the witness, and his honor the Chief Justice sustained the objection. The witness then immediately made a transfer of his stock to Nathan Williams, Esq., the plaintiff's counsel, and was then offered as a witness, and objected to by the counsel for the defendants, on the ground that by the 6th section of the act to incorporate the stockholders of the bank of Utica.

ca, it is enacted that no transfer of stock shall be valid or effectual, until such transfer shall be registered in a book or books to be kept for that purpose by the directors, and unless the person making the same shall previously discharge all debts due by him or her to the said corporation, which exceed in amount the residuary stock of such person ; and that inasmuch as there was no registry of the transfer in this case, and no evidence of the previous discharge of all debts owing by the witness to the corporation although no debts were proved to be due from the witness to the bank, such transfer was not valid or effectual, and did not, therefore, restore the competency of the witness. But his honor the Chief Justice overruled the objection and admitted the evidence. He then testified, that when the note fell due it was regularly demanded, protested for non-payment, and notice given to the defendants. The cause was here rested on the part of the plaintiffs, and the defendants objected to any recovery on the ground that the plaintiffs had not proved that they were a corporation, and insisted that they were bound to prove the statute creating them such. His honor the Chief Justice overruled the objection.

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The defendant's counsel then objected to any recovery on the ground, that by the statute creating the company, they were incorporated by the name of "the President, Directors and Company of the Bank of Utica ;" whereas the suit was in the name of "the President and Directors of the Bank of Utica." This objection was also overruled.

Colling then testified, that the note in question was the last of a series of accommodation notes, discounted at the bank of Utica, for Morse, the maker. The following abstract of this witness' evidence, as detailed in the case, will exhibit the particulars in relation to the notes, with the sums received as discount, and the result of the two different modes of calculating discount, which were examined in the next preceding case. The bank cast the discount on these notes on the same principle as upon the notes mentioned in that case.

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Time the several notes run.

First note, \$1500—dated 16th Nov. 1819.

In Nov.	14 days.
Dec.	31 do.
Jan.	31 do.
Feb.	15 do.

91 days. Discount taken, \$27 12

Interest for 93 days, \$26 76—91 do. \$26 18.

Second note, \$1500—dated 15th Feb. 1820.

In Feb.	14 days.
March,	31 do.
April,	30 do.
May,	16 do.

91 days. Discount taken, 27 12

Third note, \$1500—dated 16th May, 1820.

In May,	15 days.
June,	30 do.
July,	31 do.
Aug.	15 do.

91 days. Discount taken, 27 12

Fourth note, \$1300—dated 15th Aug. 1820.

In Aug.	16 days.
Sept.	30 do.
Oct.	31 do.
Nov.	15 do.

92 days. Discount taken, 23 51

Interest for 93 days, \$23 19—for 92 do. \$22 94.

Fifth note, \$1200—dated 15th Nov. 1820.

Int. 93 days, \$21 41. Discount taken, 21 70

In other respects, the testimony in this, was substantially the same as in the next preceding case.

Verdict for the plaintiffs, for \$1324 60, subject to the opinion of the Court, on all the questions in the cause.

The same questions were raised in this as in the last case with the following additional points:

1. Whether Colling was a competent witness.
2. Whether the plaintiffs were bound to prove themselves a corporation.
3. Whether the defendants could object the misnomer of the plaintiffs at the trial.

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H. R. Storrs, for the plaintiffs, said that the 6th section of the act incorporating the plaintiffs, which is recited in the case, was introduced merely for the protection of the bank against secret sales of stock, by a stockholder who stands indebted to the bank ; but as between him and the purchaser all his interest passes without a registry. The validity of the transfer might have been drawn in question between the bank and the purchaser, provided Colling had owed the former, but this did not appear. At any rate, all C.'s interest was vested in Mr. Williams, and if C. owed the bank, the right to the stock would have been vested in Mr. W. on his paying the debt. It is enough that all C.'s interest was gone, as between him and the purchaser.

The act of incorporation declares itself to be a public statute. The Court are bound to notice it *ex officio*, without proof *aliunde* that the plaintiffs were a corporation.

The Mayor and Burgesses of Stafford v. Bolton, (1 B. & P. 40,) settles the question of misnomer. That case decides that it should have been pleaded in abatement. Chitty on Pleadings, (vol. 1, p. 40,) treats this question as settled, and cites the cases. *Gardner v. Walker*, (3 Anstr. 935, S. P.) as to the misnomer of a natural person. *Gilbert v. The Nantucket Bank*, (5 Mass. Rep. 97,) was this case precisely, only the parties were inverted, and the misnomer was holden matter in abatement. He also cited Vin. Abr. tit. Corporations (*x*), and the cases there collected.

J. A. Spencer, contra. The statute is too plain to admit of construction. No transfer of stock is valid till certain terms are complied with. The debts of the stockholder must first be paid to the bank, and the transfer be registered. The Court will not strain the point, to make one, who is really the plaintiff in the cause, a competent witness. It is plain

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that the transfer was a mere sham. No consideration was paid. Suppose Mr. Williams did take the stock, subject to the debts of Colling: for aught that appears, he (C.) was indebted to its full amount; and he would still be interested in having the stock applied to the payment, Mr. Williams being a mere trustee for that purpose.

[WOODWORTH, J. No indebtedness appears in the case. Did it not lie with you to show affirmatively that he was indebted?]

Spencer. We suppose not; but that it lay with the other side to show that he was not indebted. His being clear of debt is a condition precedent, by the statute, and should be strictly complied with; especially as the transfer was for the mere purpose of making the party a witness.

But the plaintiffs have not proved themselves to be a corporation. This was necessary beyond all doubt. (*Jackson v. Plumb*, 8 John. 378, and the cases there cited. *Bank of Auburn v. Aiken*, 19 John. 300.) That the charter is a public act, makes no difference. This, *per se*, is not enough. If it be, the decision in the *Bank of Auburn v. Aiken* is not law. *Nul tiel corporation* was there holden a bad plea, because it amounted to the general issue, and the party was put to plead the latter. Both the charters of the Auburn and Utica banks are declared public acts, and if the acts not only prove themselves, but the existence of the banks also it would be nonsense to say that the general issue involves the question of corporation or no corporation. The plaintiffs must show a compliance with the terms of this public act, before they can claim to be recognized as a plaintiff. This is matter *in pais*.

Again: here is a material variance from the name given by the charter. They must sue by their corporate name. By this only are they known. In *Gilbert v. The Nantucket Bank*, the corporation were defendants, and we agree that a defendant must always plead a misnomer of himself. But it is otherwise where a corporation is plaintiff, and misnames itself. (Vin. Abr. Corporations, (E), and the cases there cited.) Suppose the plaintiffs had called themselves President.

alone, or Directors alone. If one part of the description may be omitted, another may ; a defendant may be entrapped by a suit in favor of a name which he never heard of ; and entirely misled both as to the form and merits of his defence. The plaintiffs here might just as well have sued in the names of one of the directors, or any twelve men which they may select. The *Mayor & Burgesses of Stafford v. Bolton*, is distinguishable. The plaintiffs there were incorporated by the name of the Mayor and Burgesses of the Borough of Stafford, *in the county of Stafford*, and sued by the name of *The Mayor & Burgesses of the Borough of Stafford*. The Court held the words, "the county of Stafford," to be mere matter of addition or local description ; as if this bank had been incorporated by the name and addition of the President, Directors and Company of the Bank of Utica, *in the county of Oneida*, and the words relating to the county had been omitted. Buller, J. in that case says, that "the argument of locality will not here decide the question. The name in the declaration imports locality ; as the plaintiffs state themselves to be the *Mayor & Burgesses of the Borough of Stafford*, only omitting, "in the county of Stafford." This brings the case within the distinction laid down in *Kings v. Lynne* ; for there is a difference in omitting matter of substance, and mere matter of addition." Here is an omission of matter of substance. The plaintiffs have a substantive corporate style. The first section of the charter declares them a corporation by a certain name and style. Had we pleaded in abatement, we should have been told, it must be in bar, within the case of the *Auburn Bank v. Aiken*.

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Storrs, in reply. The language of the case is a sufficient answer to the objection, that there was no consideration for the sale of the witness' stock. It states that he *made a transfer*, which phrase imports a consideration, and every thing necessary to pass the property. It is now too late to object that this was all a fallacy. The only ground taken at the trial was, the want of a registry. The test of C.'s interest was whether he would gain or loose by the event of the suit: When that inquiry is answered in the negative, the compe-

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tency of a witness is complete. The witness in this case, should be enabled to say that he could receive no increased profit by the dividend, in consequence of a recovery, or loss any profit by the bank being thrown in the costs. The words, *valid and effectual*, are supposed to relate to the contract of transfer between C. and W. but the rights of the latter are perfect at common law, without the registry. The provision in question was not inserted with a view to the common law right between vendor and vendee. The words, *valid and effectual*, are fully satisfied without this, by giving them a reference to the rights of the bank.

There was no objection made at the trial, that the bank must prove themselves a corporation. It related to the kind of evidence offered, which was the statute. This is a public one, and needs no proof. There are no pre-requisites mentioned in the charter to their becoming a corporation. On the contrary, the first section, (sess. 35, ch. 64,) recites, that Kipp and others are already associated, and all persons that shall become stockholders, are thereby *declared to be* a body corporate, &c. The second section declares, that subscriptions *shall be kept open*, not *shall be opened*. They are a body politic, from the passage of the act, and are so treated throughout. The cases cited are distinguishable. They relate to corporations created upon condition that certain pre-requisites should be complied with before they go into effect; as that certain sums in specie or stock shall be first raised. Even in such a case, slight proof would be sufficient, as that they had been in operation a series of years. But it is enough here that we are a corporation *ipso facto*, by the very terms of the enactment. We did, however, prove that the bank had been in operation 9 years, exercising the privileges granted by the statute. This was fully shown by the evidence of Colling, the clerk. The act provides, that it should not be forfeited for non-user at any time before February, 1813. Is not this enough, even if we were bound to go out of the act? In 1815, the legislature passed another act, (sess. 38, ch. 144,) authorizing the plaintiffs to establish a branch bank at Canandaigua. This would, of itself, be a sufficient proof of their existence. It is

true, as a general rule, that when a corporation sues, they must show themselves to be a corporation. What this proof is to be is another question. Every plaintiff must prove himself *in esse*. The proof that we acted as a corporation for a number of years, being recognized as such by the legislature, is, *at least, prima facie*, evidence of our existence as such. If the plaintiffs had ceased to be, the defendants should have rebutted our proof, by showing their civil death.

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The *Mayor & Burgesses of Stafford v. Bolton*, does not, as supposed, rest upon the sole ground of an omission in the local description. "The county of Stafford" was a part of the corporate name. Might Utica be omitted in the plaintiffs' name? If it might, and the omission would not vitiate without a plea in abatement, why not the words "and Company?" Certainly they might, and that with much more propriety; for if Utica be omitted, there would be nothing to distinguish it from any other bank; whereas omitting the word Company would still leave the description sufficiently perfect to make it understood by every body. There are not three substantive parts to the corporation. The President & Directors of the Bank of Utica, is a sufficient *descriptio personæ*. The error is, in supposing that the law implies three distinct bodies; but the variance is literal and unsubstantial merely. The case falls precisely within that of *The Mayor, &c. v. Bolton*.

SUTHERLAND, J. It is contended by the defendant—I, that Thomas Colling was an incompetent witness, and was improperly admitted by the Judge.

The objection to Colling was, that he was a stockholder in the bank, in whose name this suit was brought. He immediately assigned or transferred his stock, and was then permitted to testify. The transfer, it is said, was not valid, because it was not registered in a book kept by the Company for that purpose, the 6th section of the act providing that no transfer of stock shall be effectual, until it is so registered, and all debts due from the stockholder to the company are paid, &c. This provision was intended exclusively for the benefit and protection of the bank. Their lien upon *the stock*,

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for any debts due to them, cannot be affected by a transfer of the stock; and the only notice of a transfer which they are bound to regard, is a registry of it in their books. Payment of dividends to the original stockholder at any time before the assignment was registered, would probably be good. The legislature intended, by this section, to afford to the bank a means of ascertaining with certainty who they were bound to consider and treat as stockholders.

But if A. being a stockholder in the bank, and also indebted to the bank, transfer his stock to B. all his interest passes. It is a valid transfer as between A. and B. but B. takes it subject to the claims of the bank against A. The registry can be made as well by B. as by A. The transfer made by Colling, therefore, passed all his interest in the stock, and rendered him a competent witness.

2. It is contended, that the Judge erred in deciding that the plaintiffs were not bound to prove themselves a corporation, upon the general issue pleaded.

This objection is well taken. When a corporation sues, they need not set forth, by averment, in the declaration, how they were incorporated; but upon the general issue pleaded, they must prove that they are a corporation. (Ky. on Corp. 292. *Norris v. Staps*, Hob. 211. 2 Ld. Raym. 1535. *Jackson, ex dem. Trustees of Union Academy, v. Plumb*, 8 John. 378. *Dutchess Cotton Manufacturing Company v. Davis*, 14 John. 245, opinion of Thompson, Ch. J. *Bank of Auburn v. Weed*, 19 John. 300.)

3. It is objected, that the Judge erred in overruling the objection to the plaintiffs' right of recovery, on the ground that the suit was brought in the name of the President and Directors of the Bank of Utica, whereas they were incorporated by the name of the President, Directors and Company of the Bank of Utica. This was a mere *misnomer*; and a misnomer of a plaintiff, even in the case of a corporation, is not ground of nonsuit, but can be taken advantage of only by plea in abatement. (1 Chit. on Pl. 440. 1 Bos. & Pull. 40. *Gardner v. Walker*, 3 Anstr. 935. Com. Dig. Abatement, (E). 5 Mass. Rep. 97.) The Judge, therefore decided correctly in overruling this objection.

4. It was objected, that the note on which the suit was brought was usurious. NEW YORK.
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There is nothing to distinguish this case, upon the question of usury, from those of the *New York Firemen Insurance Company v. Ely & Parsons*,^(a) and the *Bank of Utica v. Wager*,^(b) except that the clerk who cast the interest swears, "that it was his intention, as a clerk and book-keeper, always to cast the interest at 7 per cent. only, and according to the best and most approved system in use." This does not change the legal character of the transaction. It was his intention cast and receive interest for ninety-one days, upon a forbearance of ninety, under an erroneous impression that ninety days were the legal fourth of a year. All that he means to say, then, is, that he supposed, for the purposes of interest, that the year consisted of 360 days; and upon that supposition, considering ninety days as the fourth of a year, would not give more than 7 per cent. His mistake was as to the law, and not as to any matter of fact. Upon the principles already established, in the cases alluded to, the transaction must be considered usurious, and there must be judgment for the defendant.

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(a) Ante,
678
(b) Ante.
712.

SAVAGE, Ch. J. concurred, except as to the misnomer; and added, that, as to the competency of Colling, it appeared that he absolutely assigned his stock to the counsel in the cause. The objection urged against his competency is, that the transfer was not complete till entered on the books of the bank, which had a lien upon the stock for any debt due to it from Colling; but it seems to me that this was a question to be agitated only between the bank and the purchaser. Colling had done all in his power to divest himself of the stock, provided his conveyance was valid. But as the conveyance was, for aught that appears in the case, without consideration, and evidently for the purpose of qualifying himself to be a witness, was it *bona fide*? Was not Mr. Williams a trustee for Colling? he, (W.) having neither paid nor become obligated to pay C. for the stock? It is stated, in the case, that he *transferred* his stock, and I think we are, as was mentioned at the bar, to understand that the

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transfer was made in all respects regularly, and fairly, except in the particular objected to at the trial.

The objection of the *misnomer* seems to me well taken. Under the issue joined, it was incumbent on the plaintiffs to show that they had a legal existence, and a capacity to sue. In attempting to do so, they prove, if any thing, that "the President, Directors & Company of the Bank of Utica" were incorporated, but the suit was brought in the name of "the President and Directors of the Bank of Utica." The defendants were not to know that there was no incorporation by that name. The name of a corporation is essential. They are authorized to sue by a particular name, and they certainly have no power to sue by any other. Suppose the cases put at the bar; that the President of the Bank of Utica alone, or the Directors and Company, without the President, or the Directors alone, or the Company alone, had brought the suit, I should not hesitate in saying, that such an action could not be sustained. The authorities cited to show that the defendant, if sued by a wrong name, must plead it in abatement, and cannot take advantage of this informality on the trial, prove to my mind the reverse of the proposition as to the plaintiff; and that a variance of this kind must be taken advantage of on the trial, especially where the plaintiff is a corporation. The case from *Bosanquet & Puller* may be law, if placed on the ground adopted by Buller, J. that the omission related to mere addition of place; but I do not comprehend how the rule that a corporation must prove its existence upon the general issue, can, in general, be complied with, unless it is confined to the name upon record. Under this rule its existence by that name becomes matter of substance. It is an artificial technical being, and the proceedings should conform to this idea throughout.

WOODWORTH, J. concurred in the result of these opinions.

Judgment for the defendants.

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v.
Stone.W. J. & A. MARVIN *against* S. Stone, 2d, & D. Hop-
KINS.

ACTION of covenant, tried at the Ontario Circuit, in June, 1822, before his Honor, (the late) Mr. Justice Platt, when a verdict was taken for the plaintiff by consent, subject to the opinion of the Court, on the following case, with liberty to either party to turn the case into a special verdict.

The declaration was upon an indenture made by the defendants, as follows :

An executor assigns a judgment in favor of his testator, and covenants as executor, that so much is due upon it ; *held*, that the covenant is personal, and binds him in his own right

In construing a covenant, it must be considered with the context, and must be performed according to the intention of the parties as derived from both.

Accordingly, where S. & D., two of H.'s executors, as such, assigned a judgment to M in favor of H. against E. who was also executor, and S. & D. covenanted, as executors, that *there was due and unpaid upon the judgment, to the assignors, at the time of the assignment, \$698* ; *held*, that the covenant was broken *eo instanti* that it was made ; for H. having appointed E. his executor, and he having accepted the trust, this extinguished the judgment, and *so* there was nothing *due* or *unpaid* thereon within the meaning of the covenant ; for the covenant meant, 1. that it *was due* : 2. that it was due to the assignors *as executors* ; 3. due at the time ; 4. due *upon the judgment*

It is a general rule, that if a creditor appoint his debtor his sole executor, or one of his executors, and the debtor accept the trust, this operates as a release or extinguishment of the debt.

But a qualification, universal as the rule is, that where there is a deficiency of assets to pay debts, the debt due from the executor is not discharged ; but shall be considered a part of such assets.

In the latter case, it has, in judgment of law, been paid to the debtor executor, and is considered as money in his hands.

Choses in action are, generally, not deemed assets till actually received by the executor.

But if he releases the debt, it is assets ; and he shall be adjudged to have received it.

The appointment, by a creditor, of his debtor an executor, is considered in the nature of a *specific bequest* to him of the debt, and as such must give way to creditors.

But a specific bequest takes preference of general legacies, and, as such, the bequest of the debt will be preferred.

On a deficiency of assets to pay debts, all the general legacies must abate proportionably ; but a specific legacy is not to abate at all, unless there be a deficiency without.

Whenever, from the whole will, it appears that the testator did not intend to discharge the debt, by making his debtor an executor, the latter is a trustee to the amount of the debt for the legatees or next of kin.

But making a judgment debtor executor with others, and in the will bequeathing all *judgments* that may be in the hands of his executors to others, does not show such intention.

The debt, when assets for legatees, &c. would be considered money in the hands of the debtor executor.

Covenant. Cases cited illustrating the proposition that though the letter of a covenant be fulfilled, yet an action lies, if its spirit and intent be violated. *The Attorney General, arguendo.*

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" This indenture made the 17th day of November, 1819, between Simon Stone, 2d, an executor, and Doratha Hopkins, executrix of the last will and testament of Caleb Hopkins, late of Pittsford, in the county of Ontario, deceased, of the one part, and William Marvin, John Marvin, and Alexander Marvin, of Albany, of the other part. Whereas Caleb Hopkins, in his lifetime, did, in August term, A. D. 1816, recover by judgment in the Court of Common Pleas, in and for the county of Ontario, against Augustus G. Elliot, of Pittsford, aforesaid, the sum of 1000 dollars of debt, and also 10 dollars for his damages, as, by the record, &c. Now this indenture witnesseth, that for and in consideration of the sum of 698 dollars, &c., paid, &c., to the said S. S. executor as aforesaid, and the said D. H. as executrix as aforesaid, they have assigned, &c., to the said W. M., J. M. and A. M., &c., the said judgment, &c., and all the benefit and advantage, sum and sums of money, that may be had, obtained or gotten, by reason or means of said judgment, or any proceedings to be had thereon. And the said S. S. executor, and D. H. executrix, as aforesaid, do covenant with the said W. M., J. M. and A. M. that they have not received nor will they receive the said moneys due on the said judgment, nor any part thereof; and that there is now due and unpaid upon the said judgment, the said sum of 698 dollars; neither shall or will release or discharge the same or any part thereof, but will own and allow of all lawful proceedings for the recovery thereof, they, the said W. M., &c., saving the said S. S. and D. H. harmless from all costs that may happen to them thereby. In witness, &c."

The declaration contained several counts in which the breach assigned was, that at the date of the indenture, there was not due and unpaid upon the judgment, the sum of 698 dollars; but that the judgment was fully released and extinguished, and Elliot wholly discharged from the payment thereof, to wit, on the 27th day of February, 1818; because Caleb Hopkins, the plaintiff in that judgment, on the 26th day of September, 1817, duly made his last will and testament, and appointed Augustus G. Elliot, the defendant in that judgment, together with the defendants in this suit, ex-

ecutors thereof, and afterwards died without revoking the same, and that Elliott accepted the appointment, duly proved the will, and took upon him the execution thereof. There was also a count assigning the breach generally, by negating the words of the covenant.

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The defendants pleaded the general issue, and several special pleas, denying that Elliott was discharged from the judgment in manner and form as the plaintiffs alleged, affirming that, at the date of the indenture, there was due and unpaid on the judgment, 698 dollars, denying that Hopkins appointed Elliott his executor, and averring that Elliott did not accept the appointment of executor, and did not prove the will, and did not take upon him the execution thereof.

There was also a notice of special matter, to be given in evidence on the trial, viz. that the sum of 698 dollars was paid to the defendants by the plaintiffs, in consideration of their assigning the judgment against Elliott; that they assigned the same as executors of Hopkins, and received the money as such executors; and before any notice on the part of the plaintiffs, that they claimed the repayment of the money, they paid out and expended, the same in satisfaction and discharge of divers debts and demands against Hopkins, as assets in their hands, and above and beyond the assets in their hands; that the plaintiffs, having judgments and other incumbrances against the real property of Elliott, of a younger date, purchased the judgment in favor of Hopkins, in order to let in their judgments that Elliot always acknowledged the sum of \$698 was due and unpaid upon the judgment, and always expressed his intention to pay it.

At the trial, the plaintiffs proved the indenture, and the will of Caleb Hopkins, dated 26th of September, 1817, by which a large real property, situated in the county of Ontario, was devised, and a large personal property bequeathed, subject to the payment of debts, and Elliott and Stone appointed executors. and Doratha Hopkins, executrix, which will was proved by one of the subscribing witnesses, on the 27th day of February, 1818, and letters testamentary then granted to the executors and executrix, named in the will. It was agreed that this will should be made a part of the

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case. After bequeathing several legacies, it contained these words: "In addition to the above legacies or sums, I will and order, that all sums of money, bonds or *judgments*, that may be in the hands of my said executors, that have not been disposed of, in and by my aforesaid will, shall be equally divided between my two sons, &c., to be paid, &c. Also all lands, goods and chattels, that have not been disposed of by me, in the above will and testament, shall be equally divided between my two sons."

The defendants' counsel objected that they should not be put on their defence, until the plaintiffs showed that there were assets of Caleb Hopkins in their hands sufficient to pay his debts, or that there were no debts; and also contended that the construction of this covenant was not as the plaintiffs supposed, that *the money was absolutely due and payable on the judgment*, but *that it had not been paid*; and that the very words of the covenant showed, that its being collectable was uncertain and contingent. His Honor overruled the objections, reserving them, and directed the defendants to proceed with their defence.

A variety of evidence was then given by both parties, touching the question whether the defendants had fully administered the estate of their intestate; whether there was a deficiency of assets; and a deposition of Elliott was read by consent, stating that the Marvins had sold all his real estate upon junior judgments; that he intended to pay the judgment assigned to the plaintiffs; but had been prevented by poverty, &c. But as the arguments went chiefly, and the opinion of the Court wholly, upon grounds independent of the defendant's evidence and the plaintiff's proof in reply, it is not deemed material to detail either.

Verdict for the plaintiffs for \$800, subject, &c.

The cause was briefly opened by Mr. *H. B. Davis* for the plaintiffs, who confined himself to a statement of the facts and the points, which latter were as follows:

1. The covenant is *personal* upon the defendants.
2. It is broad enough for the case; the true intent of the parties, and the legal construction of the covenant being,

that the judgment assigned was not released, extinguished or otherwise discharged; that the amount was due and payable, and might without any existing legal impediment, be collected by the assignees.

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3. The appointment by Hopkins of Elliott as his executor, and Elliott's acceptance of the appointment, was a release and extinguishment, or payment, in law, of the judgment.

4. If the judgment is not released, on failure of funds to pay debts, yet it can only exist as between creditors and executors of the testator, being assets in their hands, and could not be enforced by *scire facias*, by the defendants against their co-executor; and is wholly extinguished and inoperative in the hands of the assignees, who could not have execution on it for their benefit.

5. The evidence derived from the depositions of Elliott was improperly admitted, it being wholly irrelevant.

He was followed on the same side by

Talcott, (Attorney General.) There is nothing in the covenant, nor is there any evidence in the case, to show that at the time of purchasing the judgment, the plaintiffs had any knowledge that Elliott was an executor.

We admit that this sum of \$698 was never actually advanced or paid by Elliott, or any person in his behalf, either to the testator or to his co-executors. The defendants contend that, therefore, it is "*due and unpaid*," and so there is no breach of the covenant. We answer, that the debt, as such, is, in judgment of law, under the circumstances of this case, extinguished, paid or satisfied, so far forth, at least, that it cannot be said to be due within the true intent, meaning and spirit of the covenant.

The Court therefore will have two general questions presented to them: 1. What is the true construction of the covenant? 2. Did the appointment of the judgment debtor as one of the executors, and his acceptance of the trust, produce such an affect upon the judgment, or the situation of the debtor, or the other executors in relation to it, as is inconsistent with the spirit and intent of that covenant?

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(a) 6 John.
80.

(b) 7 East,
240, 1. Com.
Dig. Cove-
nant, (D).

(c) 2 Com.
on Cont. 532.

(d) 8 John.
406. Bac. Abr.
Covenant, (F).

(e) Co. Litt.
183. 2 Bos. &
Pull. 22. 9
East, 16.

(f) 1 Sid.
48. Com. Dig.
Covenant, (D).

(g) Com. Dig.
Covenant, (F)
(E 1). Sir. T.
Ray, 464, in
Griffeth v.
Goodland; &
see Hopkins v.
Young, 11
Mass. Rep.
302.

First, then, as to the construction of the covenant. Covenants are to be construed according to their spirit and intent.(a) This spirit and intent is to be gathered from the whole context.(b) The rule laid down, as taken from Pothier, is: we ought to interpret one clause by the others contained in the same act, whether they precede or follow it.(c) If, after all, it remains doubtful which of two meanings is the true one, the law has then furnished another rule.(d) That construction is to be adopted which is most strongly against the covenantor, and most beneficial to the covenantee.(e)

Having ascertained by the application of any, or all of these rules, what the spirit and intent of the covenant are, it must be performed according to that spirit and intent; and a performance which is strictly according to the *letter* of the covenant, if it violate the spirit and intent, is as much a breach as if it violated the letter also. If a man act contrary to the intent of the covenant, it shall be a breach though he perform the words.(f) Examples: If I covenant to deliver so many yards of cloth, and I cut it in pieces, and then deliver it, it is a breach; for the law regards the real and faithful performance of all contracts. So if one covenant to leave the trees on the land, and he cuts them down, and leaves them there.(g) The defendant, a common brewer, covenanted that the plaintiff should have seven parts of all the grains made in his brew house (for seven years) and afterwards put great quantities of hops into the malt, of which the grains were made, by means of which the grains were spoiled; the grains were, however, delivered in this condition. Upon action of covenant, it was objected that it would not lie, because the covenant was fulfilled by the delivery of the grains, and that the only remedy for the plaintiff was an action on the case for that fraud. But the Court held that it was the intent, that the plaintiff should have them for the use of his cattle; of course, that he was to have them in such a state that his cattle would eat them; that when hops were mixed with them, cattle would not eat them; therefore, though the grains were, in fact, delivered so as to comply with the *letter* of the covenant, they were

not delivered in such a state as to answer the spirit of it, and it was consequently broken, and the action maintained.^(h)

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To apply those rules of construction to the present case :
To *whom* and *how* is the judgment due according to the covenant ?

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To whom due.—The defendants say that there is due \$698 on the judgment. They described themselves as executor and executrix of the plaintiff in the judgment, to whom it would be due, if living. When, therefore, they represent themselves in the capacity of persons who have succeeded to the rights of him to whom it was due in his life, they, of course, represent that by virtue of their succession to *his* rights, it is now due to *them*. If they do not represent it as due to *them*, how came *they* to assign it ? Can a man assign a debt *to which he has no title* ? And when he assigns a debt, and covenants generally that it is due, does he not covenant that *it is due to himself who assigns it* ? The spirit and intent of the covenant, therefore, is, that it is due *to them*.

^(h) 2 Jones,
191, *Griffeth*
v. *Goodland*.

Next, how and in what manner, and to what extent and effect due to them ? *Due to them as debts of a testator ARE USUALLY DUE TO EXECUTORS* ; for they disclose no circumstances in the covenant, to show that this is not an ordinary case.

Due to them upon the judgment as such ; for such are the words of the covenant.

Due to them in such a manner that they had a right to ASSIGN IT ; for they undertake to assign it. They covenant that they have not received, and will not receive any of the moneys due on the judgment, and will not release and discharge the same, or any part thereof.

It was, therefore, a covenant that the debt was so due to them that they might receive the moneys, and had power to release and discharge the debt.

They covenant to own and allow all lawful proceedings for the recovery of it, the plaintiffs saving them harmless from costs ; these proceedings to be *in their names*. Else, why the covenant to *own* them ? Else, why stipulate for an indemnity against *costs* ? They would not be subject to *costs*, unless the proceedings were in *their names*.

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They therefore covenanted, in intent and meaning, that it was so due to them that lawful proceedings might properly be instituted in their names for the recovery of it.

The spirit of the whole covenant, as gathered from the context, is therefore this: That the debt is due to them as debts are ordinarily due to executors, and so due that they have the right and power to collect or discharge it; and that lawful and effectual proceedings for its collection may properly be instituted in their names.

Having thus ascertained the spirit and intent of the covenant, the next question is—

2. *Did the appointment of the judgment debtor, as one of the executors, and his acceptance of the trust, produce such an effect upon the judgment, or the situation of the debtor, or the other executors, in relation to it, as is inconsistent with that spirit and intent?*

The general rule is, that if a creditor appoint his debtor his executor, such appointment, unless the executor renounces, will operate as an extinguishment or discharge of the debt. (i) This rule is not peculiar to the common law, but seems to be a rule of *general reason*, resulting from the nature of such contracts, and adopted by every finished system of jurisprudence. *Si debitor creditori vel creditor debitori succedat, sine dubio, extinguitur obligatio; una cum obligationibus accessoris pignorum et fidejussorum, eo quod confusio talis pro solutione valet, ut nemo potest apud eundem pro eodem obligatus manere.* (j) By confusion is

(i) Toller's
Law of Exrs.
ch. 4, s. 9, p.
347.

(j) Voet,
Pand. Lib. 16,
tit. 3, s. 19.

(k) Poth. on
Cont. part 3,
ch. 5, s. 1, &c.
1 Evans' Poth.
425.

(l) Id.

meant the concurrence of two qualities, in the same subject, which mutually destroy each other. This takes place when the creditor becomes heir of the other, or *vice versa*. (k) The same consequence ensues when the creditor succeeds to the debtor by any other title which renders him subject to his debts; and when the debtor succeeds, by whatever means, to the rights of the creditor. (l) In all these cases, the quality of debtor and creditor concur in the same person.

It is evident, that, by the concurrence of the opposite characters of debtor and creditor in the same person, the two characters are mutually destroyed; for it is impossible to be both at once. A person can neither be his own creditor,

nor his own debtor. Hence, indirectly, results the extinction of the debt, when there is no other debtor ; for as there can be no other debt without a debtor, and the confusion having extinguished the character of debtor in the only person in whom it resided, and there being no longer any debtor, there cannot be any debt.

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In accordance with these principles, Courts of common law have held, 1. That if the obligee of a bond make the obligor, his executor, this amounts to a release, at law, of the debt.(m) 2. The same consequence results, when the obligor (as here) is only *one of several executors* ; for one executor cannot maintain an action against another.(n) 3. The same doctrine applies to the case of a judgment debtor as to a debtor on bond.(o)

(m) 8 Co
136.

(n) Off. Ex
31. Plowd
204.

(o) Thomas
v. Thompson,
2 John. 471.

But it will be said, that to permit a testator to disappoint his creditors of the funds for satisfying their debts, by appointing his debtor executor, is against the principles of justice and equity ; and it has, therefore, been held, that the debt shall be assets in the hands of the executor, when the other assets are insufficient for the purpose of discharging those debts. It will then be contended, on the other side, that the assets in this case are insufficient ; that, therefore, the debt itself is assets, from which the inference will be deduced, that the debt cannot be considered as extinguished, but that it is due and unpaid, within the covenant.

We admit the law to be so settled, and well settled. Assets, however, are to be presumed, till the want of them is proved. Here the want of them has not been proved. In truth the contrary appears. But if there were not sufficient assets, without this debt, so that the debt is considered as assets, it is so far from supporting the inference that the judgment is not discharged, that it is the very doctrine which, of all others, shows that the judgment, *as such*, is discharged ; for Elliott is accountable, *not in the capacity of judgment debtor*, but as *executor*. It is admitted that there may be found scattered through the books, expressions of Judges sometimes, at first view, apparently inconsistent with each other, and sometimes, perhaps, a little deficient in

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(p) Per Ld.
Talbot Cas.
Temp. Talb.
241.
(q) Wank-
ford v. Wank-
ford, 1 Salk.
302.

(r) Bredi-
men's Case, 6
Co. 58, 59.

(s) Owen, 36,
Sav. 119, pl.
188, S. P.

(t) Noel v.
Nelson, 1
Vent. 96. 2
Vern. 299, S.
P. arg.

(u) Com.
Dig. Assets,
(D). Off. Ex.
92. Bac. Ab.
Executors,
&c. (H) 2 vol.
417.

(v) Toller's
L. Ex. ch. 3,
a. 1, p. 157.

(w) Giles et
al. v. Dyson et
al., 1 Starkie,
32.

perspicuity. This has arisen from the difficulty of expressing without circumlocution, the precise effect produced upon the debt, by constituting the debtor executor. But the current of decisions has been uniform, and there is one principle running through them all, viz. that the debt is *assets*, for the payment of creditors. "It was never doubted but a debt due from an executor to a testator shall be *assets in the executor's hands*, to pay debts." (p) And per Powell, J. (q) "Some books say the *action* is gone, some say the *debt* is gone, and some say the *debt remains*; but they will be *all reconciled by this, that the debt will be assets.*"

It will be contended on the other side, that this debt is not discharged because it is *assets*. It is material to inquire, therefore, *what assets are*, and when and how a *debt* due to the testator becomes *assets*? "And it is to be observed, that a right for which a good remedy by action is given, is not yet *assets*, until it be recovered and reduced into possession." (r) If a man is indebted, by obligation, £100, to a testator, this obligation is not *assets* in the hands of the executors, until it be recovered by them. (s) Bonds and specialties are no *assets* till the money is paid. (t) Debts due to a testator upon a judgment, statute, or specialty, are not *assets* till actual recovery and receipt. (u)

This doctrine is also supported by the more modern authorities. Toller (v) says, in relation to choses in action, "The executor is entitled to the testator's debts of every description, whether debts of record, as judgments, statutes and recognizances, or debts on special contract, &c., &c., and all such debts, *when received* by the executor, shall be *assets* in his hands. And it was held by Ld. Ellenborough, in 1815, that debts due to an intestate are not to be considered as *assets*, until actually paid; and that, on a plea of *plene administravit*, it was necessary to prove that the amount had been received." (w)

There are, indeed, some cases in which an executor must account for a debt *as assets* which he has never *actually received*; but all these cases are put upon a ground which fortifies our argument, viz. that the executor has so conducted as, in judgment of law, amounts to a receipt, and gives rise to

that presumption, *juris et de jure*, which is incapable of contradiction, that the debt has been received by him. Take the case of a *release* by him. *Per Periam*, "If an executor release an account, and it can be proved that so much was due, it is assets; *for the law presumeth he hath received so much as he doth release.*"(x) If an executor release a debt, or discharge one in execution, it shall be accounted, in law, *assets received.*(y) Damages recovered may be assets, though never actually received, as by being released by the executor; for this amounts to a receipt.(z) In no other case, therefore, is an executor liable for a debt due to the testator, *as assets in his hands*, unless the debt has been actually received, or has been placed in such a situation that in judgment of law, it is considered as received.

Apply this doctrine to the present case. The defendants say the debt is assets. If so, the judgment itself has ceased to be an outstanding debt; because, in order to become assets, it must be considered as *received*; and here, as the same hand which is to *pay* is also to *receive*, in judgment of law, it is considered *as received*:

This is supported not only by the authorities already cited, but is strongly fortified by other courses of reasoning founded upon other classes of cases bearing upon the same point. Danby, Choke & Moile, Justices, held(a) that when a creditor makes his debtor and another his executors, and has no other goods but the same debt, the executor debtor shall be charged with the same to those to whom the testator *was indebted*; and he shall be charged to account for the same before the ordinary. For *what* is an executor to account before the ordinary? He is to declare what goods and chattels, belonging to the testator, *he has received*, and what debts and legacies he has paid. This shows that he does not account for the whole inventory already filed, but only for such part of it as has been actually *received*, or is deemed to be *received* in judgment of law. The Court, therefore, when they said he must so *account for his own debt*, must have held that the debt was, in judgment of law, to be considered as collected or *received* by him in his capacity of executor, and the money in his hands *as such.*(b)

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(x) *Brightman v. Keighley*, Cro. Eliz. 43.

(y) *Per Hobart*, Hob. 59.

(z) *Off. Ex.* 70.

(a) *Plowd.* 186.

(b) 2 *Fonbl. B.* 4 Pt. 2. ch. 3, sec. 4, p. 412, 2 ed.

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(c) *Simmons*
v. *Gutteridge*,
13 Ves. 264

Where there had been a decree against an executor to account, Ld. Eldon said, (c) "a debt due from an executor is assets, for the same plain reason, that an executor who is a creditor may retain. The consequence seems necessary that under the usual decree against an executor, an interrogatory should be pointed to the inquiry, whether he has *assets in his hands arising from a debt due by himself*."

Again, it may be said, if an executor does not administer the amount of his debt, it is a *devastavit*. An executor can be guilty of a *devastavit* in relation to debts due the testator in *only two ways*: 1. Where he releases the debt, or does not take the proper measures to collect and receive it. 2. Where, when it is collected and received, he does not properly administer it. An executor cannot take any measures to collect and receive *a debt of himself*. He cannot, therefore, commit a *devastavit* in the first manner by neglecting to take proper measures. It must be committed in the second mode, and as that can only be done when the debt is collected and received, the debt in this case must, in judgment of law, be deemed to be collected and received by him, and in his hands as executor to be administered.

350 (d) L. Ex. If the testator leave the executor a legacy, it is held to be a sufficient indication that he did not mean to release the debt due from the executor, and in such case, says Toller, (d) the executor shall be a *trustee to the amount of the debt*, for the residuary legatee or next of kin. No man can properly be a trustee of a judgment *against himself*, i. e. of the *judgment itself*. It is incident to a trust, that a *trustee*, should have the power of transferring or assigning the trust property to a *cestuy que trust* having the whole beneficial interest, unless specially prohibited from doing so, or unless the doing so would or might defeat the particular object of the trust.

Apply that doctrine here, and what shall we have? *an assignment of a judgment by the judgment debtor himself!* The language of Toller is scrupulously accurate and points to the very doctrine for which we contend. He speaks of a *trustee to the amount of the debt*, not of the debt itself. Then that amount must be considered in his hands as execu-

tor, and received on the judgment. The result of the cases stated in *Bridgman*,^(e) is, that if a debtor be made executor, the debt is totally extinguished. But it seems that it is only parting with the action; for the executor is considered as a trustee for the money, and such money is considered in equity, as part of the testator's personal estate. Here the ownership of so much money is taken from him, who owes in his private capacity, and transferred to his official capacity, so as to make a part of the fund which ought to receive it. Of course, then, the debt is paid to the fund.

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(e) *Bridgm.*
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ecutors, &c. X.

Hence, because the debt is assets; because the executor is to account; because he may commit a *devastavit* in relation to it; because he is trustee of the money; and because the money ceases to belong to him in his individual capacity; but is considered part of the testator's estate; the debt must be considered, in judgment of law, received by the executor, the money in his hands as executor, and the judgment as such, therefore paid.

But we rest not solely upon these general principles, and inferences deducible from them, however convincing and irresistible we may think them to be. There are opinions of the ablest Judges directly in point. In *Wankford v.*

Wankford,^(f) the question was, whether the appointment of an obligor to be executor of the obligee, was such a discharge of the obligation that the administrator, *cum testamento annexo*, of the obligee, could not sue the representatives of the obligor after his death: *held*, that he could not; and, by Holt, for two reasons: 1. By the appointment of the obligor executor, he became entitled to receive the money, and he being the person who was to pay it, the same hand was to pay and receive, which operated an extinguishment. 2.^(g) "That when the obligee makes the obligor his executor, though it is a discharge of the action, yet the debt is assets, and the making him executor amounts to payment and a release. If H. be bound to J. S. in a bond of £100, and then J. S. makes H. his executor, H. has actually received so much money, and is answerable for it; and if he does not administer so much, it is a *devastavit*." In *Stevens, admr. v. Gaylard*,^(h) Jackson, J. (delivering the opinion of the Court)

(f) 1 Salk.
305, 6.

(g) Id. 306.

(h) 11 Mass.
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says, "As soon as the debtor is appointed administrator, if he acknowledges the debt, he has actually received so much money, and is answerable for it. This is the result with respect to an executor, and the same reason applies to an administrator, as the same hand is to receive and pay, and there is no ceremony to be performed in paying the debt, and no mode of doing it but by considering the money to be now in the hands of the party as administrator." He afterwards says, "The consequence is, that he and his sureties in the administration bond, are liable for the amount of such debt, in like manner as if he had received it from any other debtor."

(i) 12 Mass.
Rep 201.

It would be a waste of time to enter into an argument to show that if these authorities are to be relied upon, and the amount is in the hands of the executor, as such, it amounts to payment, as *Ld. Holt* says, and that the judgment which has thus produced this amount in his hands, is not a judgment due and unpaid. One authority, however, even on so plain a point. It is said in *Winship v. Bass et al.*,⁽ⁱ⁾ "there is no doubt that formerly by the common law of England, when a debtor was made executor, the debt was discharged, unless a different intent of the testator could be inferred from the will itself. The reason given in some of the books is, that the same person is to pay and receive, and as the executor cannot maintain an action against himself the debt shall be considered as paid. But to avoid manifest injustice to creditors, the same law held that the debt thus considered to be paid, should be assets, &c." Again; speaking of an administrator,^(j) "the remedy at law may be suspended during his administration, but will revive after it ceases; and indeed he may be charged on his administration bond as having received the amount of his debt; for having voluntarily assumed the trust which prevents any other from receiving, and being unable to sue himself, he shall be considered as having paid the debt, and holding the amount in his hands as administrator."

(j) Id. 203.

If, after this, it can be supposed the judgment against *Elliott* is to be considered, in point of law, due and unpaid, we ask to whom is it due? To *Elliott* himself? "A man cannot be his own creditor and his own debtor, and if so, the

other executors had no interest, and could not assign." To the other executors? "One executor cannot owe his co-executor in that capacity. They cannot sue each other.^(k) After Elliott's death, they could not sue his representatives. They are not liable for *his devastavit* as to this debt. They are not liable to account to creditors for it; for they cannot collect it, and having no personal interest in it themselves, it cannot be due *to them*. To the creditors of Hopkins? How? to all jointly—the whole? or each proportionably according to his debt? Shall each one sue him in *debt on judgment*, or can any one sue him in *debt on judgment*? No one can tell to whom this judgment, as a *judgment debt*, is *due*, and support that opinion either by reason or authority.

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^(k) Toller
L. Ex. 348
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sec. 9.

J. C. Spencer, for the defendants, made the following points :

1. The appointment of Elliot an executor, did not absolutely discharge the judgment.

2. If it did, it would not be a breach of the covenant.

3. If the covenant imports that the judgment was valid and subsisting, it is satisfied by the facts in the case, showing a deficiency of assets; and also by its being valid in equity for the next of kin.

4. In any event, the plaintiffs being volunteers, cannot question the validity of the judgment.

He said that considerable reliance might be placed, in the conclusion, upon the assumed fact, that the real estate was devised to the executors for the payment of debts; but we contend that such is not the true construction of the language in the case. The words are, "by which a large real property, situated in the then county of Ontario, was devised; and a large personal property bequeathed, subject to the payment of debts." We say, the expression, "*subject to the payment of debts*," applies only to the last antecedent, *personal property*. In *Eagles v. Carey*,^(l) the expressions, "I will all my debts shall be paid before any of my legacies, or gifts hereinafter mentioned," were held not to charge the testator's land with the payment of debts. We

^(l) 1 Vern.
457.

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deem it only necessary to refer to the whole will, to show that the testator never devised his real estate to pay his debts, and we contend, that if any ambiguity arises from the language of the case, it is entirely removed by a reference to the will.

But whether there were assets or not, for the payment of debts, we hold to be quite immaterial. The judgment against Elliott was as much assets for the next of kin, as for creditors; and creditors and next of kin stand precisely on the same footing. If this judgment can be made available to either, the words of the covenant are satisfied.

The authorities cited, as collected in Bridgman's Index,

(m) Tit. Ex-
ecutors, &c.
pl. X.

(n) 1 Atk.
461.

(o) 1 Salk.
299.

(p) 1 Atk.
463.

(q) Bridgm.
Index, tit. Es-
tate, real and
personal, H.

(m) are *Hudson v. Hudson*, (n) and *Wankford v. Wankford*.

(o) The language of the Chancellor in *Hudson v. Hudson*, is certainly very strong, that the debt is totally extinguish-

ed. But it is to be remarked, that this was used by way of argument, and was not a decision on any point in the case; and, what is remarkable, the very next case in Atkyns,

Fox v. Fox, (p) is a decision on the very point, directly the contrary, viz. that, notwithstanding at common law, the making an obligor executor extinguished the debt; yet, in this case, the *bond* shall be considered as assets in the hands of the executor, to be applied, after paying funeral expenses and legacies, to the exoneration of the real estate, in favor of the heirs." This is a very strong case. It proceeds upon the familiar principle in equity, that the heir has a right to call on the executor to apply the personal estate in discharge of a mortgage, as the first fund.

(q) The Chancellor, in *Fox v. Fox*, makes the bond of the executor personal property, applicable to the payment of funeral expenses and legacies, and belonging to the heir; but this could not be so, if it were *absolutely extinguished*, in the language used in *Hudson v. Hudson*. That language, then, should be taken with the qualification annexed in *Fox v. Fox*, at *common law*, and then the case of *Hudson* proves nothing.

The case *Wankford v. Wankford*, so much relied upon by the Attorney General, merely proves, what has not been denied, that, at *common law*, an action cannot be sus-

tained on a bond given by an executor to his testator; although the *reasons* given are extremely questionable, and may induce the Court to relax the rule, "according to the exigencies of society, and the lights and improvements of the age." Yet it not denied that the older authorities are so. But, in that case, the observations of Powell, J. at page 302, are worthy of remark. "He said that some books say, the action is gone, some say the debt is gone, but they will all be reconciled by this, that the debt will be assets." Probably the true question between the parties on this part of the case is, what is meant by the books' saying, *the debt is assets in the hands of the executor?*

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The Attorney General has cited several cases to show the meaning of the term *assets*, and that a debt is not to be deemed assets, until it is collected. In *Termes de la Ley*,^(r) "*assets* are said to be, when a man makes executors, and leaves them sufficient to pay, or some commodity, or profit is come to them in right of their testator." Toller^(s) says, "the personal property that is of a saleable nature, and may be converted into ready money, is called *assets* in the hands of the executor or administrator, that is, *sufficient*, from the French *assez*, to make him chargeable to a creditor and legatee, or party in distribution, as far as such goods and chattels extend;" and in the case of *Fox v. Fox*, before mentioned, it will be observed that the Chancellor calls the *bond* assets in the hands of the executor, to be applied for the benefit of the heir. There are a great variety of cases where executors are made chargeable as for assets, that never came to their hands; as where by negligence or delay in collecting debts, or prosecuting for them, they have become desperate;^(t) all which would seem to show, that a security may be assets, before it is collected; and, in this case, why is not the judgment against Elliott as much assets in the hands of the other two executors, Messrs. Hopkins and Stone, as in Elliott? Could they avoid accounting for it to creditors, by saying that it was *not assets*? It is doubtless true, that in the cases cited by the Attorney General, particularly those from Massachusetts' Reports, the Courts

(r) Tit as-
sets.

(s) L. Ex
137.

(t) Toll. L.
Ex. 427.

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have said that they will hold the executor liable for the debts he owes his testator, as assets in his hands, on the ground that *he is presumed to have paid himself*. In the case of a solvent and responsible executor, as all those cited appear to have been, this was sufficient for the purposes of the suit. But because the Courts have, in such cases, made that presumption, it by no means follows that such is the only ground of the liability of the executor; or that such liability is limited to his personal responsibility only. It is sufficient to say, that in none of the cases, was the question presented, whether the Courts would enforce a security which was valid, and would be effectual against the property of an executor, who was insolvent, and against whom there were no other means of proceeding to collect the debt?

(u) L. Ex. 349 The Attorney General contends, that the executor is liable *quasi* executor, and not as *debtor*; Toller, (u) gives the reason why the debt of an executor shall be assets to pay creditors, viz, that it is highly unreasonable that the claims of creditors should be defeated by a release absolutely voluntary; and the same reason is given in 2 Black. Com. 512; but upon the ground taken by the Attorney General, the object of the rule of law would entirely fail in every case, where the executor was insolvent, although a valid and sufficient security for the debt *existed*; for though, according to his doctrine, the testator cannot release the executor, as it would be a fraud on his creditors, yet he may discharge the only remedy for collecting the debt. In other words, he would be permitted to do that indirectly, which he is not allowed to do directly.

(v) *Moses v. Murgatroyd*, 1 John. Ch. Rep. 127, 128. In many of the cases cited on the other side, and in all the elementary books, the executor is called a trustee for creditors, legatees and the next of kin, and there is no doubt he is such. Now the securities and liens which a trustee has, are incident to the principal trust, and belong as much to the *cestui que trust*, as the debt itself. (v) If A. should assign to F. in trust for B, a debt owing by Z. of \$500, which is secured by a mortgage, can there be a doubt that B. would be entitled to compel the trustee F. to foreclose the mortgage if it was necessary to collect the debt? The very point is

decided in *Jackson v. De Lancey*.^(w) Kent, J. says, in that case, "Even if the technical legal estate in the mortgage, had descended to the heir, he would have been but a mere trustee for all the children, to whom the beneficial interest was devised; and they would have been entitled to use his name to recover the money, or to foreclose the mortgage, or to gain possession." The case cited by him in 2 Vesey Senior, p. 45, is to the same point. If it had been the mortgage of the heir himself, it is presumed it would have made no difference. The powers of a Court of Equity would have been abundantly sufficient to enforce the security. The case of *Orr v. Kaines*,^(x) shows that where an executor is insolvent, the Court will make a legatee whom he has paid, refund. In *Crane v. Drake*,^(y) a creditor was allowed to pursue the specific fund sold, to a purchaser. If, then, the executor be a trustee for creditors, and next of kin, to whom the debt belongs, why should not a mortgage given by him, be enforced for their benefit, if it was the only means of collecting the debt? And if a mortgage, why not a judgment? The technical difficulties arising from the executor being defendant, and the representative of the plaintiff, if they are insurmountable at law, are easily overcome in Equity, where a bill might be filed to charge the land held by such judgment. It is an old head of Equity, that the Court will lend its aid to enforce judgments at law, where there are any obstructions.^(z) Its jurisdiction will be exercised whenever, upon principles of universal justice, the interference of a Court of Judicature is necessary to prevent a wrong, and the positive law is silent.^(a)

The familiar case of a judgment and execution creditor, seeking the aid of a Court of Equity to charge choses in action, that had been fraudulently assigned, and could not be levied on by execution at law, is in point to show the power and practice of that Court, in enforcing judgments at law; and the case of *Egdell v. Heywood*^(b) is very much in point, to show that when the remedy at law is obstructed, in consequence of technical difficulties, equity will interpose to give effect to a judgment at law, and on the express ground that the ordinary remedies there cannot be had. Thus, a

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(w) 1 John
Rep. 559.

(x) 2 Ves
Sen. 194.

(y) 2 Vern
616.

(z) Mitf. Pl.
2d ed. 103,
104, ch. 2, s.
2. Coop. intr
to his essay on
Pl. in Ch
xxxiv.

(a) 1 Fonbl
11.

(b) 3 Ath
352.

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(c) Sugd. L.
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bond from a woman to her intended husband is enforced in Equity, although void at law, and extinguished by the intermarriage.(c)

If this reasoning, and the inference from the authorities be correct, then is it established that a creditor of Hopkins, in case of a deficiency of assets, would be entitled to the aid of a Court of Chancery to enforce the judgment against Elliot's lands; and, of course, the judgment must be valid, due and unpaid, if there were such deficiency of assets.

Without now entering into that question, we contend that the *next of kin* stand in the same situation with creditors and legatees; and are equally entitled to the remedies which a creditor may have.

The position taken on the other side, that the appointment of a debtor executor, is a specific bequest, is conceived, at this day, to be entirely exploded. The authorities clearly establish that he is merely a trustee; that his name implies it.(d)

(d) *Simmons v. Gutteridge*, 13 Ves. 262. *Askwith v. Chamberlain*, 1 Ch. Rep. 138. *Field v. Clark*, id. 242. *Carey v. Goodinge*, 3 Br. Ch. Cas. 110. *Bennet v. Bachelor*, id. 28. *Brown v. Selwin*, Cas. Temp. Talb. 240. 4 Br. Parl. Cas. 179, S. C. *Errington v. Evans*, Dick. 456.

The remark in Toller, 350, that an executor has a right to his debts exclusive of legatees, rests upon 2 Bl. Com. 512 and Hargrave's note on Co. Litt. 264, a. Blackstone, in the place cited, states the doctrine, and refers to Salkfield, 303, which is the case of Wankford, and contains no such rule. Hargrave, in his note, considers the appointment of an executor, as a specific bequest to him, to *pay the debt*, but does not say a word as to his having a preference over the legatees. Toller, keeping in view this idea of the executor being an exclusive legatee, proceeds to state several cases of *exceptions* in Equity, and to give the reasons for them: and, so far from the rule being as he states it, the case of *Brown v. Selwin*,(e) is in point to show that the executor is a trustee even for a *residuary* legatee, and must account to him for his debt. We say that the cases he puts as exceptions, with many others already cited, show the *rule itself*, in Equity, to be different from what he states it; and prove that the executor is not considered a legatee in that Court.

(e) Cas. Temp. Talbot, 240. 4 Br. Parl. Cas. 180, and vid. Fort. 240.

(f) 11 Ves. 87.

For instance, the case of *Berry v. Usher*,(f) cited on the other side, is put by Toller on the ground that, "although without a legacy, (to the executors) yet it appearing, by the

tenor of the will, that the testator considered him in the light of a mere trustee of his whole property, his debt was clearly held not to be discharged." This case was directly opposed to Toller's rule, and he was bound to get rid of it; and if he cannot do this, it must overthrow the rule. Now he has assigned a ground of distinction, which none of the able counsel in the case thought of; which the Master of the Rolls does not recognize, or even allude to, and which is really unfounded in fact. Upon examining the case it will be seen, that Usher had many and various duties to perform, as *executor*, such as payment of money and interest to two persons, for long periods. Toller also quotes the case of *Fox v. Fox*, with a "so where," &c., as if that was a case of an executor being a mere trustee; whereas that case cannot possibly be reconciled with this rule, nor explained upon any of the exceptions which he has stated; and it is utterly at war with Hargrave's idea of a specific bequest to pay the debt. Toller also cites the case of *Carey v. Goodings*,^(g) as an exception to his rule, and puts it upon the ground of legacies having been given to the executors, as a sufficient indication that the testator did not mean to release the debt. Now, although it is true legacies were given in that case, yet that does not appear to have occurred to the counsel for the defendants, as being worthy of their notice, and the Chancellor, Lord Thurlow, gives no such reason, but says expressly, that the appointing of a debtor executor *was no more than parting with the action*, which he thought had been a settled point; and, therefore, declared the debt of the executor a trust for the next of kin. What right has an elementary writer to assign a reason for a decision which the Court not only did not give, but which would make the decision proceed upon a ground so different from that given by the Court, as in effect to contradict it? We rely much upon this case, and upon the reason assigned by the Chancellor, and we consider it conclusive until it is shown to be overruled.

The last clause of the will disposes of "all sums of money, bonds or judgments, lands, goods or chattels, not before bequeathed or devised, to the two sons of the testator."

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(g) 3 Br Ch
Cas. 110.

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(A) Dick. 456.

These bequests, we contend, are broader, if possible, than "*all the rest and residue of my estate,*" and that they make the two sons legatees of the judgment against Elliot. These legacies meet completely even the rule laid down by Toller, at page 350. They not only furnish a "strong inference" that the testator did not intend to bequeath the debt to Elliott, but they afford irresistible evidence that he meant to give it to his sons. In addition to the cases cited by him, I would add *Errington v. Evans*, (h) where it is said, "if an obligee makes an obligor one of the executors, and takes no notice of the bond, but devises the residue of the estate to others, I am clear it is not an extinguishment of the debt, though at law it will be so, because a personal demand, once suspended, is not to be resumed." The latter part of this remark, it is contended, would be applicable only were we seeking to enforce a judgment in a Court of law. But we ask no such thing. We say that if it can be enforced in Equity, it is sufficient to satisfy the words and the spirit of the covenant; and if it be valid in Equity, for the benefit of legatees, then we say the executors would be decreed trustees for their benefit; and that its being a lien on land would be an incident attending that trust which a Court of Equity would sustain and enforce, if the benefit of the trust can be obtained only in that way. The authorities already cited, and the arguments urged, we think establish that a Court of Equity would declare the judgment a lien on the lands of Elliott.

Talcott, (Attorney General,) in reply. The ground is not materially changed by the argument for the defendant. Most of it had been anticipated; and, indeed, the greater part of the principles it contains, as deducible from cases, were insisted upon as favoring the plaintiffs rather than the defendants.

As to the construction of the will in relation to the real estate, the Court will judge from an inspection of it. But even admitting the construction contended for by the defendants to be true, it could make no difference with the case, *in principle*. For a moment let us examine the origin and reason of the English doctrine, as to marshalling assets.

It grows out of a set of familiar principles. 1. The heir NEW YORK, May, 1894. cannot be disinherited by implication. 2. The *real estate* is not liable for the payment of the ancestors' debts, (except in cases of liens,) unless expressly charged with them; but debts and legacies must be paid out of the *personal property*. 3. The will of the owner of property is to be carried into effect, when not contrary to law.

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When a man dies, justice requires, in the first place, that his debts should be paid. If he has given a legacy in his will, he of course intends that the legatee should have it, and after the payment of debts, the claim for the legacy must be satisfied. If, however, he makes no provision for the payment of the debts or legacies out of his real estate, the common law of England presumes that the legacies were given under an idea that the personal estate was sufficient for all purposes. If it turns out otherwise, the legacies must abate, because they were given under a mistake; and it was not the will of the testator that the legatees should have them *at all events*, but only in case the personal estate was large enough to pay debts and legacies too. If the testator charges his debts on his *lands*, then the performance of his will does not depend solely on his *personal estate*, and Equity very properly marshals assets in favor of legatees. But in this state the law itself subjects the real estate of the testator to the payment of his debts; and if, in England, Equity will marshal assets, whenever the real estate is so subjected, why not do it here? What difference in principle does it make, whether it is so subjected by the act of the party, in a *particular case*, or by the act of the law which applies to *all cases*?

But, says the counsel, this is all immaterial; for, admitting there are sufficient assets to pay all debts, still this judgment is as much assets for *the next of kin*, as for *creditors*, and should be distributed among them. For this he relies on the case of *Fox v. Fox*.⁽ⁱ⁾ That case, upon an examination, will be found to have proceeded upon its peculiar circumstances; and to show that the case itself is not considered, in England, as furnishing the general rule, but rather as an exception to the general rule, it is necessary only to

(i) 1 Ask
463.

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refer to 11 Vesey, Jun. 90, note (a) where it is said, of this case, "*Under the circumstances of Fox v. Fox, the executor could not be permitted, in Equity, to avail himself of that character, at the same time insisting upon his mortgage, the only consideration for which was the debt.*" It is true that where a debt is due from an executor, a Court of Equity, under the particular language of the will, many times raises a trust for residuary legatees, and even for next of kin ; but the true rule is that laid down by Toller, Blackstone, Hargrave, and indeed, by all the elementary writers, and is substantially this : that making the debtor executor is, *prima facie*, a bequest to him of the debt ; but this legacy will not be permitted, any more than other legacies, to interfere with the payment of *debts* ; yet being in the nature of a *specific* legacy, it will, in general, and unless there is some peculiar provision or language in the will, take precedence of legacies *at large* ; and so, too, it will take place of the rights of the next of kin, unless the phraseology of the will is sufficient for a Court of Equity to raise a trust in their behalf.

The cases put as exceptions, by Toller, &c., are, in truth, so ; and the remarks made upon them, by the counsel on the other side, when compared with the cases themselves, will be found erroneous. The case of *Berry v. Usher*, was a case of clear trust.

But it is said that the provisions of the will, in this case, show that, as to this judgment, the executor was a trustee only. The clause alluded to is that directing " that all sums of money, bonds or *judgments, that may be in the hands of my said executor*, that may not have been disposed of, in and by my aforesaid will, shall be equally divided between my two sons."

But this clause extended only to judgments in the *hands of the executors*. Now the judgment in this case never could be in the *hands of the executors*. As to Elliott, it was not a judgment in his hands as such. (A judgment is in the hands of a plaintiff, or *some person claiming under him*, not in the hands of the *defendant*.) It was not in the hands of the other executors. They could not sue it, or institute any proceedings for its collection. It was not, therefore con

templated by that language of the testator. But suppose it had been ; was it a judgment so due and unpaid that the executors had a right to *assign it*, when the will directed them to divide it between the two sons ?

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But if it is assets, as contended by the defendant, still, we repeat, the judgment debt, *as such*, is considered as paid, and the amount in the hands of the executor, *in his capacity of executor*.

But to this it is objected, that it would, in some cases, drive the creditors of a testator to rely on the personal security of an executor, who might be insolvent. This objection might be made to the general power of an executor, in ordinary cases. He has always the power to discharge a judgment obtained by the testator. He, by this, however, may make himself liable for a *devastavit*. So where the judgment is against himself, if he does not pay it, he is liable for a *devastavit*, and the same remedy exists against him in the one case as in the other. The doctrine as to the right to securities by a *cestuy que trust*, is inapplicable to the case of executors, and furnishes no limitation of their powers.

It seems to be admitted, on the other side, by the remarks on *Errington v. Evans*, (j) and other remarks in the course of the argument, that the debt is *extinguished at law* ; but the counsel contend, that it is not extinguished *in Equity*. Here it must be remembered that the question is a question *at law*, and must, therefore, be decided by the *rules of law*, and not by any different rules of Equity. (j) Dick 456.

But how could the claim be enforced in equity ? Not as a judgment. The cases where Courts of Equity interfere to assist a judgment or execution, are cases where the party has a right to an execution on the judgment. He is then helped by the intervention of a Court of Equity to reach property which he could not otherwise reach ; but the Court will not give him a right to issue execution on an extinguished judgment, for the sake of helping him to take a particular species of property, or otherwise, when he has no right to take any kind of property by such process.

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But who could apply to a Court of Equity in a case like this? Not the *other executors*; for they have no interest in the debt. They have no power to collect it, are not accountable for it, and though the non-payment of it by Elliott should be a *devastavit* in him, an executor is liable only for his own *devastavit* and not for that of his co-executors. The other executors, therefore, being without interest in the subject matter, could not maintain proceedings in Equity, (whatever creditors or next of kin might do,) and if so, they had not the power to assign any such right; and, as to them, the judgment is extinguished in Equity as well as at law.

Again: even admitting Elliott to be a trustee, the other executors are not *cestui que trusts*. If he is a trustee, he is for creditors, legatees, or next of kin. Now no person can assign an interest in trust property, but the trustee or *cestui que trust*; and as the defendants were neither, they had nothing to assign. And it seems to be very clear, that where a person is neither the absolute or conditional owner of a debt, not a trustee or *cestui que trust* of it, there is nothing due to him; and if he covenant that the debt is due to him, (as the fair, and only fair interpretation of this covenant,) the covenant is broken *eo instanti* that it is made.

Curia, per SUTHERLAND J. (after stating the facts.) The case turns upon the construction of the covenant, and the effect and operation of appointing Elliott an executor. There is no dispute as to any material fact. The covenant was not denied, on the argument, to be a personal one upon which the defendants are responsible in their individual character, and not as executors.

1. What, then, is the true construction of the covenant? It is unnecessary to cite authorities, to show the rule of interpretation, that the whole covenant, with its context, is to be taken into consideration; and that is to be considered the covenant, which, from such consideration appears to have been the true intent and meaning of the parties. If the intention of the parties be doubtful, that construction is to be adopted which is most beneficial to the covenantee. Testing this covenant by these rules, and there can be no doubt,

1. That if the judgment assigned was satisfied or extinguished *by operation of law*, it was as much a breach of the covenant as though it had been paid in money or discharged by a release ; for if it was satisfied, in judgment of law, neither the sum of \$698, nor any other sum, was due upon it : 2. That the covenant implies that the sum due and unpaid is *due to the covenantors* at the time of the assignment : 3. That it was due to them as the representatives of Caleb Hopkins, the plaintiff in the judgment : and 4. That it was due upon the judgment.

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2. The breach of the covenant is said to be the necessary result of the judgment creditor's appointing the judgment debtor one of his executors, and his acceptance of the trust.

It is undoubtedly true, as a general rule, that if a creditor appoint his debtor his executor, or one of his executors, and he do not renounce the trust, such appointment shall operate as a release or extinguishment of the debt, or the action for it, upon the ground that such must have been the intention of the testator ; because, by making the debtor an executor, he voluntarily destroys the only remedy or means by which the debt can be collected. The rule is universal, that when the remedy is suspended by the act of the party entitled to it, it is destroyed forever. The consequence is the same, if the debtor is a co-executor with others ; for one executor cannot sue another. (*Thomas v. Thompson*, 2 John. Rep. 471. Toll. L. Ex. 272, Lond. ed. 1800, ch. 4, s. 9. 8 Rep. 136. Bac. Abr. Executors, &c., (A) 10. 8 Bl. Com. 512. Plowd. 184. *Wankford v. Wankford*, 1 Salk. 299. 11 Mass. Rep. 259. 12 id. 201. Off. Ex. 31, 32.)

But there is one qualification as universal as the rule itself ; that where the testator does not leave funds sufficient for the payment of his debts, the debts due from the executor shall not be discharged ; because the testator shall not be permitted, by a *voluntary release*, to defraud his creditors of their just claims. In such a case, therefore, the debt due from the executor, shall be considered assets in

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his hands, for the payment of the debts of the testator. By considering it assets, the difficulty is avoided as to the means of enforcing payment. It cannot be assets in the hands of the executor, until it ceases to be a debt due to them, and has, either *in fact, or in judgment of law*, been paid to, and received by them. *Choses in action, or debts due to the testator upon judgment, statute or specialty*, are not assets till actual recovery and receipt. (6 Rep. 58. *Noel v. Nelson*, 1 Ventr. 94. Com. Dig. assets, (D). Bac. Abr. Executors & Administrators, (H) 2. Toll. L. Ex. 272. 1 Starkie, 32. 2 Vern. 299.) If an executor release a debt due to the testator, in judgment of law, he shall be considered as having received it, and it shall be assets in his hands. (*Cocke v. Jennor*, Hob. 66. Cro. Eliz. 43.)

If, then, there be a deficiency of assets, in this case, and of consequence, the debt due from the executor becomes assets, in judgment of law, is ceases to be an outstanding debt, and becomes money in the hands of the executor. The judgment against Elliott, therefore, was paid and discharged; and the covenant of the defendant, that the sum of \$698 was due and and unpaid, was broken.

The opinion of Holt, Ch. J. in *Wankford v. Wankford*, (1 Salk. 306,) is explicit upon this point. He says, "when the obligee makes the obligor his executor, though it is a *discharge of the action yet the debt is assets*; and the making him executor, does not amount to a legacy, but to *payment and a release*. If A. be bound to B. in a bond for £100, and then B. make A. his executor, A. *has actually received so much money*, and is answerable for it. And if he do not administer so much, it is a *devastavit*."

This subject is very ably and perspicuously treated by Mr. Justice Jackson, in *Stevens v. Gaylord*, (11 Mass. Rep. 259.) In page 269, upon this particular point, he says, "as soon as the debtor is appointed administrator, (if he acknowledge the debt,) he has actually received so much money, and is answerable for it. This is the result with respect to an executor; and the same reason applies to an administrator, as the same hand is to receive and pay, and

there is no ceremony to be performed in paying the debt, and *no mode of doing it*, but by considering the money to be now in the hands of the party in his character of administrator." The sureties in the administration bond were, accordingly, held liable for the amount, as though it had been actually received. So also, in *Winship v. Bass*, (12 Mass. Rep. 199,) it was held that the sureties of an *executor*, who was a debtor to the testator, at the time of his appointment, were responsible for the debt, upon the principle, that it must be considered as having been actually received by the executor.

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But it is contended by the defendant, that, even admitting there are assets sufficient for the payment of the *debts* of the testator, the result is still the same; for a debt due from an executor, to the estate of his testator is assets *for the next of kin*, as well as for creditors; and they are entitled to, and can obtain the fruits of it in Equity, if not at law. The general rule, I apprehend, to be otherwise. The appointment by a testator of his debtor as executor, is considered in the nature of *a specific bequest* to him of the debt, not to be paid unless there are sufficient assets to pay the debts. But if there are, then to take preference of the general legacies. This is the general doctrine as laid down by Toller, 274, (London ed. of 1800,) in support of which he cites 2 Blackstone's Commentaries, 512, and Hargrave's note on Co. Litt. 264, b, note (1.) It was said by the counsel for the defendants, that these authorities did not support the doctrine for which they were cited; that although Blackstone does state such to be the rule, yet no such doctrine is to be found in the case to which he refers as his authority; (the case of *Wankford v. Wankford*, 1 Salk. 303.) Now upon an examination of that case, it will be found that Mr. Justice Powell, in his opinion, does state the doctrine, in terms, as laid down by Blackstone and Toller. After remarking, that the extinguishment of the debt in such cases takes place, not by way of release, but as a *legacy or gift* by the will, and where that specific debt, or any part of it, is expressly devised by the will to pay a lega-

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oy, it will be assets to pay such legacy, because the testator did not intend to extinguish the debt; he says, "*But where there is no such special device, the debt shall be extinguished, notwithstanding any other legacies.*" That is, the appointment of his debtor an executor is *prima facie*, evidence of the testator's intention to give him the debt by way of legacy; and where that presumption is not repelled by some provisions of the will, inconsistent with such intention, the extinguishment shall take effect, although there may not be assets to pay the other legacies. The note of Hargrave, also, sustains the doctrine of Toller. "Still, however, (he says) when the creditor makes the debtor his executor, it is to be considered but as a *specific bequest or legacy*, devised to the debtor to pay the debt; and, therefore, like other legacies, it is not to be paid or retained till the other debts are satisfied."

Now, if it is to be considered as a *specific bequest*, then it is entitled to priority of satisfaction over *the general legacies*. For in case of a deficiency of assets, to pay the debt, all the *general legacies* must abate proportionably. But a *specific legacy* is not to abate at all, unless there be not sufficient without it. (2 Bl. Com. 513.)

Whenever, from the whole will, it appears, that it was not the intention of the testator to discharge the debt, by making his debtor his executor, then the executor shall be trustee to the amount of the debt *for the legatees or next of kin*. (Toll. L. Ev. 274; *Carey v. Goodinge*, 3 Br. Ch. Cas. 110; Cas. Temp. Talb. 346.) Now, no such intention appears from the provisions of this will. It is not to be inferred from that part which directs, that all sums of money, bonds or judgments, that may be in the hands of his executors, shall be divided between his two sons; because a judgment against one of his executors never could be in the hands of his executors, as a judgment.

But admitting that the judgment is assets for the next of kin; if it is assets, it ceases to be a judgment, and, in contemplation of law, has become money in the hands of the executor. Nothing, therefore, can be due and unpaid upon it; nor can it be assigned.

Judgment for the plaintiffs.

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Salisbury.PADDOCK *against* SALISBURY.

SLANDER by Paddock against Salisbury; for that the defendant had charged the plaintiff with arson, (setting forth the words,) also for charging the plaintiff with being a thief, and stealing apples.

Plea, the general issue.

The case was tried at the Oneida Circuit, November 28d, 1821.

One Sabin testified that he had heard the defendant charge the plaintiff, with arson as set forth in the declaration; but this witness was discredited by showing that he had deliberately denied, in conversation, what he now swore to.

A. Smith swore that the defendant admitted to him that he had charged the plaintiff with stealing apples; but on explanation, both the witness and the defendant concluded, that under the circumstances, it was a mere civil trespass.

G. White testified, that the defendant charged the plaintiff with arson as set forth in the declaration; but left it in doubt whether the words were spoken before or after the suit was brought, which was the first of May term, 1821.

S. Salisbury testified, that he heard the defendant charge the plaintiff with hooking apples; that the term *hooking* meant stealing, and was so understood; and that the defendant did not explain whether the apples were taken from the trees or not.

The defendant's counsel then proposed to inquire into the plaintiff's general character as a virtuous, honest man, or otherwise, to which the counsel for the plaintiff objected; but, the objection was overruled by the Judge; and witnesses were examined to the point of the plaintiff's good and bad character by both parties. Five witnesses for the defendant then testified that the plaintiff's character was not so good as that of people in general; a sixth that he could say nothing against it; a seventh, that he had been acquaint-

In slander, for charging plaintiff with felony, evidence of his general character, is admissible, in mitigation of damages under the general issue.

Otherwise, it seems, if justification be pleaded.

In slander, in penal actions, actions, for a libel and other actions, vindictive in their nature, a new trial will not be granted merely because the verdict is against the weight of evidence.

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ed with him 20 years, and lived within 3 miles of him and could not testify that his character was good or bad before a certain house was burnt; that he had heard much said since the burning, and many thought it was some of the Paddock family; and another witness testified that his character was good, though not much spoken of before the house was burnt. Three witnesses testified that his character had for years been bad. For the plaintiff, four witnesses testified to his uniform good character, in addition to Sabin and Salisbury.

The jury found a verdict for the defendant.

J. Lynch, now moved for a new trial, 1. because the verdict was against the weight of evidence; 2. because the evidence of the plaintiff's general character was inadmissible.

As to the first point, he said it was sufficient, if the substance of the words set forth in the declaration was proved. They need not be shown literally.(a)

To the second point, he cited *Larned v. Buffington*.(b)

S. Beardsley & H. R. Storrs, contra. The jury passed upon the credibility of the witnesses; and their finding is conclusive.(c) They were also entitled to pass upon the sense of the words,(d) and whether the conversation sworn to by White was before or after the commencement of the suit. The only words which can be considered as proved, are the *hooking* apples, mentioned by Salisbury; and this is not slander. To say of a man "he has stolen my apples out of my orchard," is not so.(e)

But it is a sufficient answer to this ground of application that the action is for a tort; and the verdict will not be disturbed because it is against the weight of evidence.(f)

It is, perhaps, immaterial whether general character was admissible or not. The jury found for the defendant on the ground that they disbelieved the plaintiff's evidence; and it is plain that the plaintiff cannot, at any rate if the cause be sent back, recover more than nominal damages. This alone would be a sufficient argument against a new trial.(g)

But the case was probably made with a view to settle the

(a) *Miller v. Miller*, 8 John. Rep. 74. 2 Bl. Rep. 961.

(b) 3 Mass. Rep. 546.

(c) 3 Bl. Com. 375.

(d) *Dexter v. Taber*, 12 John. 240.

(e) *Petty v. Waight*, 1 Bulstr. 173, & vid. *Thompson v. Bernard*, 1 Campb. Rep. 48.

(f) *Jarvis v. Hatheway*, 3 John. Rep. 180. *Feeter v. Whipple*, 8 id. 369. *Hurtin v. Hopkins*, 9 id. 36.

(g) *Hyatt v. Wood*, 3 id. 239.

question whether the evidence of the plaintiff's general character is admissible under the general issue. This point was raised several years ago, and the then Supreme Court were equally divided,^(h) though we understand that the practice at *nisi prius* has been to admit the evidence. In *Springstein v. Field*,⁽ⁱ⁾ it was received, and Spencer, Justice, said he had fully considered the question, and had no doubt about it, though for particular reasons, he gave no opinion in *Foot v. Tracy*.

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(h) *Foot v. Tracy*, 1 id. 46
(i) *Anthony's*
N. P. Rep. 185.

[WOODWORTH J. I believe this has been the uniform practice for a great number of years.]

To show that it is admissible upon precedent, the counsel cited the following authorities: Peak. Ev. App. 92. 1 Phil. Ev. 140. *Earl of Leicester v. Walter*, (2 Campb. Rep. 251.) ——— v. *Moor*, (1 M. & S. 284.) *Larned v. Buffington*, (3 Mass. Rep. 546.) *Brunson v. Lynde*, (1 Root, 354.) *Seymour v. Merrills*, (id. 459.) *King v. Waring et ux.* (5 Esp. N. P. Rep. 13.)

So of several other actions, which involve character: In adultery. (*Elsam v. Faucett*, 2 Esp. N. P. Rep. 562. Bull. N. P. 27, 296. 1 Phil. Ev. 139. *Bromley v. Wallace*, 4 Esp. N. P. Rep. 237.) In an action for seduction. (*Bamfield v. Massey*, 1 Campb. Rep. 460. *Dodd v. Norris*, 3 Campb. Rep. 519. *Boynston v. Kellogg*, 3 Mass. Rep. 189.) In an action for a malicious prosecution. (*Rodriguez v. Tadmiré*, 2 Esp. N. P. Rep. 721.) Breach of marriage promise. (*Johnson v. Calkins*, 1 John. Cas. 116.)

They also cited *Finnerty v. Tipper*, (2 Campb. Rep. 72.)

Curia per SUTHERLAND J. Evidence of the plaintiff's general character was properly admitted by the Judge. The plea was the general issue, merely, without any attempt to justify. In such cases, it is admissible for the defendant to prove many circumstances in mitigation of damages, and, among others, the bad character of the plaintiff. In *Foot v. Tracy*, (1 John. Rep. 46,) the Court were equally divided upon this point, Kent, Ch. J. and Thompson, J. being

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of opinion that the evidence was admissible, and Livingston and Tompkins, Js. that it was not.

The opinions of the former seem to me to be supported by the better reason, and they certainly are in accordance with the late English and American authorities. Thus in the *Earl of Leicester v. Walter*, (2 Campb. Rep. 251,) which was an action for a libel, the defendant was permitted to show in mitigation of damages, that before, and at the time of publication, the plaintiff was *generally suspected* to be guilty of the crime imputed to him; and that on that account his relations and friends had ceased to associate with him. Ch. J. Mansfield said the rule was so settled. The same doctrine was held by Eyre, Ch. J. in *Knobell v. Fuller*, (Peak. Ev. App. 92, 3d ed.) So in *King v. Warring et ux.* (5 Esp. Rep. 14.) Lord Alvanley says, "that where the words charge the party with a crime or conduct injurious to his reputation, evidence of antecedently *good character* is *admissible*; *general character* is, in some respects, put in issue." The case of the *Earl of Leicester v. Walter* was sanctioned by the King's Bench in ——— v. *Moor*, (1 M. & S. 285.) Lord Ellenborough says, "certainly a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished; and it is competent to show that by evidence." In *Larned v. Buffington*, (3 Mass. Rep. 546,) the same principle was recognized, though the evidence decided to be admissible there related to the rank and condition, and not the character of the plaintiff. In *Walcott v. Hall*, (6 Mass. Rep. 514,) Ch. J. Parsons admits the rule to be, that evidence of the plaintiff's *general character* may be given in mitigation of damages. The evidence was rejected in that case on the ground that it did not relate to his general character but went to prove the existence of particular reports injurious to him. It was inadmissible, in that case, also, because the defendant had put in a plea of justification.

In *Rodriguez v. Tadmire*, (2 Esp. Rep. 721,) the defendant was permitted to give evidence of the general bad character of the plaintiff in an action for a malicious prosecution. So also in actions for criminal conversation, and breach of

promise of marriage, the general character of the wife, in the one case, and the plaintiff in the other, as to chastity, may be given in evidence in mitigation of damages. (1 John. Cas. 116, Bull. N. P. 27, 296, 1 Phil. Ev. 139.) That the character of the party in actions of this nature should be taken into consideration in estimating his damages, all must admit; and since the want of character cannot be pleaded specially, it must be admitted under the general issue. Nor is there, as Ch. J. Kent observes, any general principle of law violated by it. Every man is supposed capable of sustaining his general character, though no man is presumed to be capable of repelling a specific charge without notice.

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As to the verdict of the jury, we cannot disturb it. (*Dexter v. Taber*, 12 John. 239.) There was no misdirection of the Judge, or any rule of law violated; and the general rule is undoubtedly, as stated by Mr. Justice Spencer, in *Jarvis v. Hatheway*, (3 John. Rep. 180,) that in penal actions, and in actions for a libel or defamation, and other actions, vindictive in their nature, unless some rule of law be violated in the admission or rejection of evidence, or in the exposition of the law to the jury, the Court will not give a second chance of success. (1 Burr. Rep. 24. 2 Salk. 644.)

Motion denied.

MURPHY against THE PEOPLE.

CERTIORARI to a Court of Special Sessions of Otsego county. The return stated (among other things) that on the 27 July, 1823, Murphy was brought before Ariel Thayer, one of the Justices of the Peace of Otsego county, on a charge of petit larceny; and, upon his examination and the testimony of the prosecutor, was committed to jail for want of bail to appear at the next Court of General Sessions.

The 4th section of the act declaring the powers and duties of justices of the peace, (2 R. L. 507, 8,) and creating a special session for the trial of petit larceny without a jury,

is not contrary to any provision in the constitution of the United States or of this state.

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On the 29th day of July, and more than 48 hours after the commitment, the Justice certified the cause thereof to Elisha Foote and David Lent, Esquires, Justices of the same county, and required them to associate with him for the trial of Murphy, according to the provisions of the act, (2 R. L. 507, 8.) The Justices convened accordingly, and Murphy was brought before them, and charged with stealing a silver watch. He pleaded not guilty ; and the Court proceeded to his trial and conviction.

This cause was submitted to the Court on written arguments, in October term, 1823, upon several points, one of which was, that the law constituting the Court below, and purporting to give it jurisdiction in cases of petit larceny, was unconstitutional.

The case being before the Court, in February term last, the following remarks were made in relation to that point, by

SAVAGE, Ch. J. Proceedings of the Courts of Special Sessions have frequently been brought before this Court but their constitutionality has not been questioned, to my knowledge.

Those parts of the constitution of this state which relate to this subject, are the following: Art. 7, sec. 2. "*The trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever.*" Sec. 7. "No person shall be held to answer for a capital, or otherwise infamous crime (except in cases of impeachment, and in cases of the militia when in actual service ; and the land and naval forces in time of war, or which this state may keep with the consent of Congress in time of peace, *and in cases of petit larceny under the regulation of the legislature*) unless on presentment or indictment of a grand jury,"

So far, therefore, as the question depends on the present constitution of this state, there cannot be a doubt about it. The Court of Special Sessions was unquestionably intended to be preserved.

The old constitution adopted in 1777, contains these provisions : Art. 35.—"Such parts of the common law of Eng

and, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the 19th day of April, A. D. 1775, shall be and continue the law of this state, subject, &c." Art. 41—"Trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever."

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It becomes important then, to ascertain in what cases trial by jury was in use in the colony of New York. By "an act for the speedy punishing and releasing such persons from imprisonment as shall commit any criminal offences under the degree of grand larceny." passed 1st Sept. 1744, offences under grand larceny were to be tried by three Justices, one of whom should be of the *quorum*. This act was in force on the 19th April, 1775, and, therefore, became incorporated into the law of the state by force of the constitution itself. There can be no ground, therefore, for considering the law in question, as a violation either of the old or new constitution of this state.

It is said, however, that to be constitutional, one of the Justices should be of the *quorum*, or a Judge of the Common Pleas; the plain answer to which is, that the question is not what *Court* shall have authority to try, but what *offences* shall be tried without the intervention of a jury? It is competent for the legislature to enact that petit larceny may be tried before one justice, or any other tribunal which, in their discretion, they may think proper to establish. It would certainly be more congenial with the spirit of our institutions, were the legislature to direct that every offence should be tried by a jury, whether before one Justice, or three, or any other number. There is, undoubtedly, a very striking incongruity between our civil and criminal codes in relation to this subject. Any party to a civil suit, be the amount in controversy ever so small, may, in a Court of Law, demand a trial by jury; but if a man is arrested, when he cannot find bail in 30 hours, for petit larceny, an infamous crime, he may be tried against his will, without a jury. It is lamentable, indeed, that it should be so, when

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a trial by jury, before the same magistrates, would be attended with no public inconvenience.(a) I am not, however, to be guided by the propriety or expediency of the law organizing these Courts, but its constitutionality.

By the constitution of the United States, (art 3, sec. 2,) it is provided, that "the trial of all crimes except in cases of impeachment, shall be by jury; and such trial shall be held in the state, where the said crimes shall have been committed; but where not committed within any state, the trial shall be at such place or places as the Congress may by law have directed."

It is only necessary to read the whole section, to perceive that the provision it contains is applicable to proceedings in the Federal Courts only. Hence the provisions as to the trial being in the state where the offence was committed, and when committed in no state, but in a territory, or perhaps on the high seas. The same answer is given to the 5th and 6th amendments. "The United States, in their collective capacity, are the OBJECT to which all the general provisions in the constitution must be understood to refer." (Federalist, No. 83. A View of the Judicial department in relation to the trial by jury—by Hamilton. 3 Hamilton's Works, 279.)

The constitution of the United States, was intended to regulate the general political interests of the nation, and the modes of proceeding by its own officers; but never to regulate the internal policy of the individual states.

The other Justices did not discuss this question; but they agreed clearly with the Chief Justice.(b)

The cause, however was continued for advisement upon the merits till the present term, when the judgment was reversed, upon the ground that the evidence in the Court below did not make out a felony.

(a) The legislature then in session, saw this matter in the same light with the Chief Justice; and passed an act giving the prisoner the right of trial by jury, in all cases, before a special session. (Vid. Laws, sess. 47, ch. 238. s. 47.)

(b) This question has, I am informed, repeatedly arisen at Nisi Prius, at which the decisions have not been uniform. Having been several times raised before the Judge of the Fourth Circuit, he was led to an ex-

amination of the subject ; and at the last Cortland Circuit, the question being again made was answered by the opinion which follows :

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EJECTMENT, for part of lot No. 72, in Cincinnatus, tried before Judge WALWORTH, at the Cortland Circuit, in June, 1824. The plaintiff sought to recover on a mortgage of the premises, given by the defendant to the lessors of the plaintiff.

The defendant called Samuel Curry to prove the mortgage paid. The witness was objected to, as incompetent, on the ground that he had been convicted of petit larceny.

It appeared from the record of the trial, before three Justices of Cortland county, that on the 14th of August, 1809, Curry was arrested on a charge of stealing a bag of wheat, and being brought before the magistrate who issued the warrant, he refused to give bail for his appearance at the next general sessions, and would not consent to a trial before a Court of special sessions, without a jury. The justice committed him to the custody of the constable, and at the expiration of 48 hours, the prisoner still refusing to give bail, a Court of special sessions was organized, agreeably to the provisions of the act of the 24th March, 1801, which proceeded to the trial and conviction of the prisoner.

The defendant's counsel insisted, that the trial and conviction of Curry, against his consent, and without indictment or jury, was unconstitutional and void, and that he was still a competent witness.

WALWORTH, Circuit Judge. It is objected, that the trial of Curry by the special sessions, without jury or indictment, was a violation of the constitution of this state, and also of that of the United States.

The former constitution of this state was in force at the time of this conviction, and the only part which had any bearing upon the question, was the 41st article. [That part of the constitution provided, that trial by jury, in all cases in which it had before been used in the colony of New York, should remain inviolate forever, and that the legislature should, at no time thereafter, institute any new Courts but such as should proceed according to the course of the common law. If the act of 1801, authorizing a trial by special sessions, without indictment or jury, in cases of petit larceny and other small offences, had been the first law instituting such Courts and authorizing such trials, it would have been a palpable violation of this article of the constitution.

But this act was only a revision of a former law, which was in force at the adoption of the constitution, in 1777, and as it respected these Courts and the offences of which they had cognizance, contained no new provisions. The first act instituting such Courts, and containing substantially the same provisions, was passed by the colonial legislature in 1744. It was amended in 1768, and was re-enacted in the revisions of the laws in 1788, 1801 and 1813 ; and it is recognized and provided for by the 7th article of the new constitution of this state. [No right of trial by jury ever existed in those Courts until it was authorized by the act of the last session. The legislature, therefore, did not establish any new Court, and the right of trial

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by jury remained as it had been used in the colony of New York previous to the adoption of the constitution.]

The validity of the act of 1801, in reference to the constitution of the United States, depends upon the 5th and 6th articles of the amendments to that instrument. By the 5th article, "no person shall be held to answer for a capital, or otherwise infamous crime, unless on indictment or presentment of a grand jury;" and the 6th gives to the accused the right of trial by jury, in all criminal prosecutions. If either of these amendments are restrictive upon the powers of the states, or applicable to criminal prosecutions under the state laws, the trial of Curry was a violation of the constitution, because he was tried for an infamous crime, without indictment or presentment, and was deprived of the benefit of a jury trial. But, from the investigation I have given this subject, I have come to the conclusion, that none of these amendments are applicable to the individual states; that they are restrictive upon the powers of the general government only, and applicable to the proceedings under the authority or laws of the United States.

The terms of these amendments are broad enough to embrace criminal proceedings in all Courts, and there is nothing in the 5th and 6th amendments, taken by themselves, to show whether they were intended to be thus extensive in their operation, or only applicable to the federal government. It, therefore, becomes necessary, in order to ascertain the true construction, to refer to the causes which produced the amendments, to the time and manner of their adoption, and other attendant circumstances.

It was a well known fact, that a very considerable portion of the people of the United States, among whom were some of our most distinguished citizens, strenuously opposed the adoption of the federal constitution, on the ground that the powers of the general government were not sufficiently limited. They insisted that the authority of the state governments was too much weakened, and that there was danger of their being finally swallowed up in a consolidated government. Several states, and among others the state of New York, for a long time refused to accept the constitution which had been recommended by the convention of the states; and when the state conventions finally ratified it, they recommended amendments and modifications, mostly restricting the powers of the United States. The convention of this state, in their act of ratification, declared, among other things, that an indictment ought to be presented by a grand jury, as a necessary preliminary to the trial of all crimes cognizable by the Judiciary of the United States, and that such trial should be by an impartial jury of the county where the crime was committed. In consequence of these recommendations, Mr. Madison, at the first session of congress, brought forward, in the house of representatives, a proposition to amend the constitution; and that body finally adopted 17 amendments, which were sent to the senate for its concurrence. The 14th of these amendments provided, that *no state should infringe the right of trial by jury, in criminal cases, nor the right of conscience, nor the freedom of speech or of the press.* The senate expunged this amendment, which was the only one restricting the powers of the states, and consolidated and adopted

the substance of all the others, with a few trifling exceptions. They also amended the preamble, by reciting, as the reason of their proposing the amendments to the states for adoption, that the conventions of a number of the states, had at the time of their adopting the constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added. Ten of the amendments thus agreed to by congress were afterwards sanctioned by the requisite number of states, and thus became a part of the constitution.

Many of the states have given a practical construction to these amendments, by the various provisions which they have incorporated into their state constitutions, which have been formed or amended since these amendments were adopted. By the constitution of Connecticut, indictment by a grand jury is required only in cases where the punishment is death or perpetual imprisonment. In Mississippi no indictment is required in the case of slaves, and they are entitled to a trial by jury in capital cases only. The first amendment proposed by the late convention in Massachusetts, required indictment only in cases where the punishment was to be infamous. By the constitution of New Hampshire, adopted in 1792, the legislature are prohibited from depriving the accused of the right of trial by jury, in capital cases; and in most of the other state constitutions, which have been formed or altered since that period, there will be found exceptions to the right of trial by jury, and other provisions, which are wholly inconsistent with the idea that these amendments to the constitution of the United States restrict the powers of the state governments.*

I am, therefore, clearly of opinion, that these amendments were never intended to limit the powers of the states, or to control the proceedings of state Courts; and that Curry was legally and constitutionally convicted of an infamous crime, which disqualifies him from being a witness.

Noxon & Birdseye, for the plaintiff.

Donelly & Clapp, for the defendant.

* For some of the facts on which this opinion is founded, vid. Old Const. of New York, art. 41; New Const. art. 7, s. 2; Const. of the U. States, am. to art. 5; Journals of the Senate, 1789, pp. 63, 72, 73 & 96; Journals of the Federal Convention, 402, 3, 10, 13, 14, 19, 28, 39, 41, 55, 66. Const. of Conn. art. 1 s. 9; Const. of Miss. art. 6, tit. Slaves, s. 2; Const. of N. Hamp. part 1. art. 16; Const. of Maine, art. 1, s. 7; Const. of Alabama, art. 6, tit. Slaves, s. 1. ✓

For a history of the Court of Special Session in this state, vid. 1 Cowen's Rep. 151, note (c).

Vid. *The People v. Goodwin*, (18 John. Rep. 187,) where the question was discussed by Messrs. *Hoffman & T. A. Emmet*, for the defendant, and

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Griffin & Wells for the people, whether the provision in the 5th amendment of the United States constitution, "nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb," is applicable to the state Courts. Spencer, Ch. J. intimates that it is, though the question was not finally determined.

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A

ABATEMENT.

See CORPORATION, 15. PLEAS AND PLEADINGS, 1.

ACCOUNTS.

See COSTS, 3, 4, 5, 6, 7.

ACKNOWLEDGMENT AND PROOF OF DEED.

See DEED, 1, 2, 3.

ACTION.

1. Where one, by action, recovers money, which has been before paid, no action lies to recover it back. *Walker v. Ames*, 428
2. And this, though the first recovery be fraudulent. *id.*
3. A county treasurer, refusing to pay money, without cause, is liable to an action. *Boyce v. Russel*, 444

See CAYUGA BRIDGE COMPANY, 3. SHERIFF, 8 to 10.

ADMISSION OF SERVICE.

See DENURER.

AFFIDAVITS.

1. The office of commissioner to take affidavits, &c., under the act of 1818, in the cities, became vacant by the appointment of new commissioners for the cities, under the act of 1823. *Browne v. Osborne*, 457
2. An affidavit for a certiorari to a justice's court may be entitled in the cause in the court below, but not in the cause in this court. *Whitney v. Warner*, 499
3. An affidavit wrongly entitled, though the cause be rightly described in the body of the affidavit, cannot be read. *Humphrey v. Cande*, 509
4. Counter affidavits will not be heard in support of a motion, even as to the character of witnesses. *Callen v. Kearney*, 529
5. An affidavit of sale under the 8th section of the act concerning mortgages, (1 R. L. 374,) is sufficient if certified in this form: "Sworn before me this 1st day of November, 1821, Geo. Dexter, comr., &c.," without expressly certifying that the deponent appeared before him, &c. *Jackson v. Gu-maer*, 552
6. *Feme sole* is sued, and marries pending the suit. This need not be noticed in the subsequent proceedings, but affidavits, notices, &c., should be according to the original title of the cause. If they treat the husband as a party, they are defective; otherwise, if the marriage be mentioned in the title as mere description of the person of the *feme*. *Roosevelt v. Dale*, 581
7. Where an affidavit was entitled in two causes, one of which was rightly and the other wrongly stated, and the affidavit pre

ceeded to speak of *the cause*, in the singular; *held*, that this was sufficient. *id.*

8. An affidavit of merits to prevent an inquest, within the rule of November term, 1808, if made by the attorney, should contain a good excuse for its not being made by the defendant. *id.*

9. Though not technically a party, yet one who marries a *feme* defendant pending the action, is substantially a defendant, and may accordingly make an affidavit of merits. *id.*

See CERTIORARI, 1, 2, 3, 11. REFERENCE.

AGREEMENT.

See COURT OF CHANCERY.

AMENDMENT.

1. Where a party inadvertently omits to file papers, necessary to warrant his judgment, or to render it formally correct, or commits a formal mistake in drawing up his judgment roll, it is *of course*, on motion, to allow an amendment; as where he omits to file the *nisi prius* record, postea, clerk's certificate, venire, and panel. These may be filed *ex parte*. *Holmes v. Remson*, 410

2. And if these, or the like papers, are lost, the court will allow new ones to be drawn and filed. *id.*

3. And they will allow the party to amend his continuances, or a *nisi prius* clause, in the judgment roll. *id.*

4. These and the like amendments, will be allowed after error brought, on paying the costs of the motion; and the proceedings in error, provided the plaintiff in error chooses to discontinue. *id.*

5. On error from the court of C. P. the record, in the eye of the law, for the purpose of being amended by that court, remains in the court below. Or, if otherwise, this court have power to amend it themselves. *Reo v. Barker*, 408

6. A mistake, in framing a special verdict in the C. P. may be amended there, after error to this court, joinder in error, and several notices of argument; especially where the delay is accounted for; as where, by mistake, a sale, in question upon the trial below was, in the special verdict, stated to have been after, instead of before, the suit brought. *id.*

7. The plaintiff's attorney may, with the consent of the defendant, after a *fi. fa.* after it is placed in the sheriff's hands, so as to make it correspond with the judgment record, without entering a rule for the purpose. *Oakley v. Becker*, 454

8. Though a *fi. fa.* be voidable for variance

from the record, the defendant alone can move to set it aside. *id.*

9. A judgment creditor in another suit has no right to do this. *id.*

10. Clerical mistake, by which cause of action was laid after commencement of suit, amended after verdict; though it was made a ground of objection at the trial; and the point was reserved. *Sargent v. Dennison*, 515

See CERTIORARI, 4, 5, 7, 8, 9, 10, 11. VERDICT, 3, 4.

APPEAL.

1. It seems, that an appeal from a final decree brings up an interlocutory order suppressing certain depositions, which may bear upon the final decree. *Wilson v. Troup*, 195

2. An appeal from a justice's judgment, the after a transcript filed and execution issued, supersedes the execution. *Shelte v. Judges of Yates County*, 506

3. This is the process of the common pleas, and they may make a rule setting it aside. *id.*

4. On appeal, a bond should be given and costs paid by the appellant within 4 days, as required by the 50 dollar act, or the appeal will be ineffectual. *id.*

5. But these facts need not appear from the justice's return. *id.*

6. It will be intended, on the return being filed, that the appellant proceeded regularly before the justice. *id.*

7. The appellee has no right to object to a hearing of the appeal, on the ground that the justice had not endorsed his approbation upon the bond, or omitted to file it within the time required by the act. *id.*

8. His approbation may be inferred from the act of filing the bond. *id.*

9. Where the computation of time in a statute is to be from an act done, the first day should be excluded. *Ex parte Dean*, 605, *Lester v. Garland*, 606, note (a) S. P. discussed. *Presbrey v. Williams*, *id.* S. P. discussed.

10. *E. g.* under the statute, (secs. 41, ch. 94, s. 17,) prescribing the time within which an appeal should be brought from a justice's court. *Id. Sims v. Hampton*, 612, note (a) S. P. *Browne v. Browne*. *id.* S. P.

See COURT OF ERRORS, 21, 22, 23, 24.

ABITRAMENT AND AWARD.

1. In dower, the tenants pleaded that the demandant's son having conveyed the premises to the tenants, with warranty, &c. the demandant and her son, by writing sealed, reciting these facts, and that the demandant had agreed with her son to take

- a certain annual sum in lieu of dower, referred it to three arbitrators to determine the amount and the security for payment, and the demandant covenanted, that on the award being fulfilled, she would release her dower to the son, and the performance of the son was guaranteed by one of the tenants; that the arbitrators awarded a sum payable quarterly by the son, or the tenants, or either of them, and that the son should pay the costs of the controversy; that a certain sum of money vested in the tenants' hands for their indemnity should be the security; and that all suits, quarrels, &c., touching the premises, should cease, &c., and that in default of fulfilling the award, the demandant might enter, &c., and the plea then averred that the costs had been tendered; that the quarterly sum had been paid to, and accepted by the demandant up to the time of the commencement of the suit; and the award in all respects performed on the part of the son and tenants: *held*, that this award was a bar to the action; that it was not necessary that a release should be awarded; that tho' the arbitrators might have misjudged as to the security, and fixed upon one which was insufficient, this would not affect the award, their determination being conclusive; that though the award was void so far as it provided for a payment by the tenants, and though it might be void in awarding costs, which had been provided for by the submission, yet this would not affect the whole, and it should stand and be enforced for the residue. *Cox v. Jagger*, 638
- 2 Where the parties have power to transfer real property, arbitrators may award that they shall do it. *id.*
 3. An award may be good in part and bad in part. *id.*
 4. Where the part which is void is not so connected with the rest as to affect the justice of the case, it is void only *pro tanto*. *id.*
 5. An award that all suits touching the premises shall cease, is equivalent to a release. *id.*
 6. An award does not transfer a title, but a party to it is concluded by his own agreement from disputing the title. It operates as an estoppel. *id.*
 7. The right to dower, till assigned, rests in action only. It may be released, but the widow cannot invest another with the right to an action for it; and an award will extinguish the right. *id.*
 - 8 The authority to award costs is necessarily incident to the power of arbitrators. *id.*
 9. An award that an annual sum shall be paid in lieu of dower is valid; but a further provision, that in default of payment the demandant may enter, is void as being repugnant to the former. The latter must be rejected, but the former remains. *id.*

10. The rule is, that when one part of an award is irreconcilable with another, the first part shall prevail, and the latter be rejected. *id.*

ARREST.

1. Arrest on process not bailable. *Kennet v Bradstreet*, 449
2. The sheriff arrested the defendant on a *cap. ad. resp.* not bailable, and on her refusing to endorse her appearance, he suffered her to go at large, and returned *cepi corpus*; and, on motion in his behalf, the court ordered common bail filed. *id.*

ASSESSMENT OF DAMAGES BY THE CLERK.

See COURT OF ERRORS, 10, 11, 12, 14, 15
ERROR, 8, 9.

ASSETS.

See EXECUTORS AND ADMINISTRATORS, 2, 3, 4,
5, 8, 11.

ASSIGNEE.

See COSTS, I. 11, 13.

ASSUMPSIT.

See CAYUGA BRIDGE COMPANY, 3.

ATTACHMENT.

1. This court cannot control the effect of an attachment, by ordering the defendant therein to be denied the jail liberties. *Anon*, 589
- See EJECTMENT, 5, 6. HIGHWAYS, 9.

ATTORNEY.

1. Whether an attorney, counsellor, &c., holds, as such, an office or public trust within the meaning of the 7th section of the 5th article of the constitution? *Quere. Seymour v. Ellison*, 13
- 2 Opinion of Sanford, Chancellor, on this point. *Case of Daniel Wood*, 29, note (b.)

3. An attorney who was ordered to pay the costs of an action which he had brought without being retained, was attached for not paying them, and a rule made, that unless he paid them in ten days after notice of the rule, he should be suspended till he paid. *Anon.* 589

See COSTS, I. 12, 13. WITNESS, 3.

AUTHORITY.

See POWER.

AWARD.

See ARBITRAMENT AND AWARD.

B

BAIL.

1. Where the plaintiff took his judgment by default, omitting by mistake, to file common bail, the supreme court, on motion, allowed him to appear for the defendant *nunc pro tunc*. Per Sudam, senator, interrupting the argument for the defendant in error. *Colden v. Knickerbocker*, 31
2. Bail who are excepted to, and do not justify, cease to be bail. *Thorp v. Faulkner*, 514
3. And an agreement between the parties to waive the exception, filing a declaration in chief, and going on to judgment, are no reasons against ordering an *exoneretur*. *id.*
4. Special bail who are excepted to, and neglect to justify, cease to be bail; and may move to have an *exoneretur* entered upon the bail piece. *Cooper v. Spicer*, 619
5. But till they do this, they may be proceeded against as bail, and their names are properly inserted in the recognizance roll. *id.*
6. Where one excepted to, and not justifying, was thus made a party *pro forma*, and sued, but no process served on him, *held*, that the exception was no defence for the other bail, but judgment might go against all, with a stay of execution as to the one not brought in. *id.*
7. *Held*, also, that the other bail had no right to move in his behalf for an *exoneretur*. The right is personal to himself, which he may waive, and suffer himself to be charged. *id.*
8. History of bail and rule to bring in the body. 477, n. (c)

See ARREST, 1, 2. RETURN OF WRITS. RULE TO BRING IN THE BODY.

BANKING POWERS.

See CORPORATION, 13.

BANKS.

See CORPORATION, 8, 9, 10, 11. USURY, VENDOR AND VENDEE.

BEQUEST.

See EXECUTORS AND ADMINISTRATORS, 6, 7, 8, 10.

BILL OF PARTICULARS.

See PARTICULARS, BILLS OF.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. An instrument in writing thus: "Doe L. R. or bearer, &c., 200 dollars and 26 cents, for value received," is a good promissory note, within the statute of Ann. *Russell v. Whipple*, 536
2. In declaring on a promissory note, it is enough to allege that the defendant made his certain note in writing, &c., without averring that he delivered it. *id.*

See CORPORATION, 1, 6, 7, 10, 11. USURY, 24, 25, 26.

C

CAYUGA BRIDGE COMPANY.

1. The amendment to the act; to incorporate the Cayuga bridge company provides, that it shall not be lawful for any person to cross the lake within 3 miles of the bridge, without paying toll; *held*, that embarking upon one side of the lake, 6 miles from the bridge, and crossing in such a direction as to leave the lake within 60 rods of the bridge, on the other side, is not such a crossing within the 3 miles, as is contemplated by the act. *Sprague v. Birdeall*, 419
2. The act further provides, that any person may pass with his own boat, within 3 miles; *held*, that any one may cross in his sleigh, on the ice, within the principle of this proviso, and according to the general intent of the act, which is, that all persons who are compelled to resort to others, to

assist them in passing, should cross the bridge; otherwise, as to those who have the means of passing independent of the bridge. *id.*

3. Yet, where one crosses the lake in such a manner as not to subject himself to the payment of toll, but on its being demanded, voluntarily pays it, he cannot maintain an action to recover it back. *id.*
4. A penal statute should be strictly construed. *id.*
5. So of a statute in favor of corporations or particular persons, and in derogation of common right. *id.*
6. They should not be extended beyond their express words, or their clear import. *id.*

CERTIORARI.

1. It is not essential, that affidavit for a certiorari to a justice's court, state the verdict or judgment. *Phillips v. Brainard*, 440
2. The omission may be supplied by an affidavit made after the 30 days. *id.*
3. The 90 days, within which the affidavit is to be laid before the judge for allowance, are computed from the time of making the affidavit. *id.*
4. How far the court will order a justice to amend his return to a certiorari. *Palmer v. Peck*, 461
5. They will not order him to return that such a thing is so; but whether it be so or not. *id.*
6. The defendant sued out a certiorari to remove an indictment from the sessions to this court, which had been returned by the sessions without the defendant having given bail as required by statute, (1 R. L. 141. s. 4,) and a commission to examine witnesses, had been issued under the direction of this court; but because no bail was in, a *procedendo* was ordered. *People v. Forward*, 501
7. A motion to amend a justice's return to a certiorari, made by the defendant in error, will not be granted, if it appear by opposing affidavits that the amendment sought will be incorrect in point of fact. *Wightman v. Clapp*, 517
8. Nor will it be granted where it appears that notwithstanding the amendment, the judgment must be reversed. *id.*
9. Where, in *assumpsit* in the court below, the defendant pleaded a tender, but the jury found for the defendant, though there was no proof of the tender, *held*, that this was a fatal error; and a motion in behalf of the defendant below, who was also defendant in error, that the justice amend by returning proof in the cause upon another point, was denied. *id.*
10. On moving to amend a justice's return to a certiorari, the court require the pro-

duction of the return or a copy of it, though the application be made by the defendant in error. *Huntington v. Goodwin*. 521

11. Title of the cause in the court below amended both in the certiorari and the affidavit, on which it was grounded. *Dexter v. Hoover*, 526
12. Certiorari to general sessions to remove proceedings, with evidence and points decided, and the judgment. *Overseers of Brookhaven v. Overseers of Southold*, 575
13. Sessions must comply with such a writ, and return the evidence, &c., though they may not have stated a case. *id.*
14. If they refuse, this court will compel them to do this by rule. *id.*

See COURT OF ERRORS, 5, 6, 7, 8. ERROR, 4, 5, 6, 7, 10.

CHALLENGE.

See COURTS OF JUSTICES OF THE PEACE, VII.

CHARACTER.

See SLANDER, 3, 4.

CHOSE IN ACTION.

See EXECUTORS AND ADMINISTRATORS, 4.

CLERK OF SESSIONS AND OYER AND TERMINER.

1. The clerks of oyer and terminer, and general sessions of the peace, are not entitled to compensation for their services rendered to the public, except in the city of New York. *Mallory v. Supervisors of Cortland*, 531
2. Clerk of oyer and terminer and general sessions, is entitled to compensation for engrossing and entering the minutes of these courts. *Doubleday v. Supervisors of Broome*, 533
3. Which the supervisors should audit. *id.*
4. Where services are rendered for the benefit of the county, and no specific mode of compensation is provided, they should be audited by the supervisors as a part of the contingent charges of the county. *id.*

COLLECTOR.

A town collector cannot pay moneys due from

the county, and charge it in account with the latter. *Boyes v. Russell*, 444

COMMISSIONER TO ACKNOWLEDGE DEEDS.

See DEEDS, 1, 2, 3.

COMMISSIONERS TO TAKE AFFIDAVITS.

See AFFIDAVITS.

CONSIDERATION.

1. *Consideration*—The voluntary restoration of that which the law will compel a man to restore, not a sufficient consideration for a contract. Per Sutherland J. *M'Donald v. Neilson*, 139
2. *Consideration*—Agreement of a son that the father shall deduct a certain part from his portion, is no sufficient consideration. Per Sutherland, J. *id.*

See CONTRACT.

CONSTABLE.

1. Amount of the allowance to constable or other person, for serving subpoenas in criminal cases, is a matter of discretion in the board of supervisors, with which this court will not interfere. *Ex parte Farrington*, 407
2. They may be served by any person, as in civil causes. *id.*
3. It seems that 19 cents for service, besides mileage, would be too high. *id.*
4. A constable cannot recover his fees upon an execution, where he has levied upon property and returned that it remains on his hands for want of buyers. *Pixley v. Butts*, 421
5. To entitle him to his fees, he must levy the money, except where he is prevented by the act of the plaintiff, or by operation of law. *id.*
6. In the former case he may recover his fees, though he have levied only, and not sold. *id.*
7. He must levy and sell in due season. *id.*
8. If no bidders attend, he should postpone the sale, and give notice to the plaintiff, who should attend and bid himself. *id.*
9. And if he do not the constable will be excused in returning that the property remains on hand for want of buyers. *id.*

10. So he would be excused in making such a return, if he could not sell the property but at a great sacrifice. *id.*
11. Yet after he has made such a return, he must proceed and sell the first opportunity. *id.*
12. If he do not sell within 30 days, he loses his lien as against other executions. *id.*
13. The same rules of law which govern sheriffs in the execution of process from the higher courts, govern constables in execution of a justice's process, except where some statute intervenes. *id.*

See COSTS, IV. 1. 2.

CONSTITUTIONAL LAW.

See COURTS OF SPECIAL SESSIONS.

CONTRABAND OF WAR.

See INSURANCE.

CONTRACT.

1. In the construction of all contracts, the situation of the parties, and the subject matter of the contract are to be considered, in order to determine the meaning of any particular provision. *Wilson v. Troup*, 195
2. This rule applied. *id.*

See CONSIDERATION. COURT OF CHANCERY. INSOLVENT, 3. PROMISS.

CORPORATION.

1. A corporation having no power, by the act of incorporation, to discount notes, but created for the purposes of insurance, has no right to carry on the business of discounting. *New York Firemen Insurance Company v. Sturges*, 664
2. A corporation has no powers, except such as are specially granted, and those that are necessary to carry into effect the powers so granted. *id.*
2. The New York Firemen Insurance Company was incorporated for the purposes of insurance, in 1810, and in 1818 an act was passed continuing that company till 1823, for the purpose of closing and winding up their business. On the 30th of August, 1817, O. & H. owed several debts to the company, and B. owed another, for which several debts they took of B. a note made by P. & H., payable at 4 months from the

- said 30th of August. These debts were all due for premiums of insurance. The company made a calculation upon the note, deducting \$23 92 interest for the 4 months, at 7 per cent., then deducted the debts, and paid the balance, which was \$20, to B. When this note became due, P. & H. offered a new note in renewal, also at 4 months, which the company took, deducting, as before, \$23 92, for the interest, and giving their check to P. & H. for the balance, and the old note was taken up. The second note was renewed in like manner for P. & H. from 4 months to 4 months, till Jan. 11th, 1819, when the last note was given. The discount taken was the fraction of a cent more than the interest would amount to for the 4 months, including the 3 days of grace. *Held*, that the company had a right to continue a debt, originally lawful, in this manner; that the last note was, therefore, valid; and that it was not usurious, though the interest was taken in advance, with such a trifle beyond the interest; nor is such a transaction forbidden by the act to restrain unincorporated banking associations (1 R. L. 234.) It cannot properly be called *the business of discounting*, which, it seems, was alone intended by the words, "*making discounts*," in the restraining act. *id.*
3. A debt due to an incorporated company will be presumed to have been contracted in the lawful course of business, until the contrary is shown. *id.*
 4. A company incorporated for the purpose of insurance, and forbidden to carry on any other trade or business, also forbidden to exercise banking powers, with a clause in the act incorporating them, enumerating the kind of securities upon which they may loan moneys, but not including promissory notes in such enumeration, have no power to loan moneys upon promissory notes, or on any securities other than those specially enumerated. *N. Y. Fir. Ins. Co. v. Ely*, 678
 5. The New York Firemen Insurance Company had no power to loan money on note or other personal security, under their act of incorporation of 1810; nor have the same company this power under their act of incorporation of 1818. *id.*
 6. Notes taken by either of these companies, upon a loan of their moneys, are therefore void. *id.*
 7. Neither had power, by their act of incorporation, to discount notes. *id.*
 8. Whether, if they had this power by their act of incorporation, it was taken away by the general restraining acts forbidding to associations, for individuals, the exercise of banking powers, &c.? *Quære. id.*
 9. Whether, where one corporation is appointed by the statute to settle the concerns of another and former corporation, which is dissolved, the latter is prohibited, by the restraining acts, from employing the funds of the former in discounting notes? *Quære.* (Vid. Laws, sess. 38, ch. 116, sess. 41, ch. 16, sess. 27, ch. 117, sess. 27, ch. 110, s. 8, 9, 2 R. L. 234.) *id.*
 10. Opinion of Sutherland, J. that to bring a corporation within the restraining act, their funds should be devoted principally to the business of banking; and that a single act of loaning money on bank discount of a promissory note, followed by several successive renewals of that note, on the same discount, would not be sufficient evidence to show that a corporation had violated the restraining statute. *id.*
 11. Opinion of Savage, Ch. Justice, that the latter would be a violation of the restraining statute. *id.*
 12. A corporation is a mere political institution, a creature of the legislature, having no other powers than what are given to it by its creator, or such as are incidental or necessary to carry into effect the purposes for which it was established. *id.*
 12. Definition of the terms, "*banking powers*." *id.*
 14. A corporation must prove its existence upon the general issue. *Bank of Utica v. Smalley*, 770
 15. Whether the misnomer of a corporation, who is plaintiff, must be pleaded in abatement, or may be taken advantage of upon the general issue? *Quære. id.*
 16. In a suit by a corporation, the declaration need not set forth, by averment, how they were incorporated. *id.*

See CAYUGA BRIDGE COMPANY.

COSTS.

See COURT OF ERRORS, 21, 22, 22, 24.

- I. In particular actions and cases, and against particular persons.
- II. Of interlocutory proceedings.
- III. Taxation.
- IV. Double costs.

I.

1. The judgment, on a report of referees upon bond conditioned to pay money and perform covenants, though reduced by set off to \$13, should be for the penalty, as a security for further breaches; and the plaintiff shall have costs, according to the amount of the penalty. Otherwise, where the condition is for the payment of money only. *Alendorf v. Stickle*, 412

2. In an action of assumpsit, brought in this court, if the plaintiff recover \$50 only, he is not entitled to costs, but must pay costs to the defendant. And the costs, on motion, will be set off against the plaintiff's damages. *Abernathy v. Abernathy*, 413
 3. If in an action in this court, the accounts of the parties, proved at the trial, exceed \$400, and the plaintiff recover a sum not exceeding \$50, whether he is entitled to costs, or must pay costs to the defendant? *Quære.* *id.*
 4. The proviso to the 1st section of the \$50 act, which denies jurisdiction to a justice of the peace, of matters of account, when the sum total of both parties, &c., amounts to \$400, extends to those accounts, only, which are open and unliquidated between the parties. *id.*
 5. When they have been settled, the balance alone is the account between them. And unless this balance, with the other accounts, exceed \$400, a justice has jurisdiction. Accounts, as used in the proviso to the 1st section of the \$25 act, have the same import as in the proviso to the 1st section of the \$50 act. *id.*
 6. So in the proviso to the 5th section of the act concerning costs. *id.*
 7. Accordingly, where on the trial of a cause at the circuit, the plaintiff proved a note of \$200, against the defendant, who then proved a note of \$600 against the plaintiff, and that, when the latter was given, the plaintiff agreed to destroy the former; but the defendant claimed nothing as due upon the latter; *held*, that neither of these notes could be considered accounts between the parties; and the plaintiff having recovered \$50 upon other claims; *held*, farther, that if the plaintiff could be entitled to costs in this court, on the ground that the accounts of both parties, proved at the trial, amounted to \$400, neither of the said notes could be considered as part of such accounts. *id.*
 8. Judgment for the plaintiff in ejectment affirmed on error, and writ of inquiry to assess the plaintiff's damages intermediate judgment and affirmance: *held*, that the plaintiff is entitled to supreme court costs for the writ of inquiry, &c., without regard to the amount recovered thereon. *Jackson v. Rathbone*, 602
 9. Where a proceeding is in continuation of a suit carried to judgment, the costs of such proceeding follow, at the same rate with those allowed in the original suit. *id.*
 10. Assault and battery, on habeas corpus, from the common pleas. 1st verdict for the plaintiff, \$25. New trial, with costs to abide the event, &c. 2d verdict for the defendant; *held*, that the defendant should recover his costs of both trials. *Carvey v. Rider*, 617
 11. An assignee of a chose in action, on which a suit is prosecuted for his benefit, on judgment for the defendant, is liable for the costs. *Waring v. Baret*, 460
 12. An attorney is liable for the defendant's costs, in a suit brought by him for a non-resident plaintiff, where the defendant succeeds: and this though the plaintiff be merely nominal, having assigned his demand to a resident. *id.*
 13. Form of the rule in such case, that the attorney pay \$100, and that the assignee pay the balance. *id.*
- See ARBITRAMENT AND AWARD, 8. ATTORNEY, 3. EJECTMENT, 5, 6, 15, 16 HABEAS CORPUS, 2.
- ## II.
1. Time within which costs must be paid or tendered, when their payment is made a condition to setting aside proceedings, &c. 599, note (b)
 2. So where they are ordered to be paid; and the manner of enforcing their payment. *id.*
 3. How costs are to be obtained, when a rule orders them to be paid. *Bradstreet v. Phelps*, 453
 4. The original rule was shown to the party who was ordered to pay, with a taxed bill of the costs; copies of both delivered to him; and demand made of the costs, which he refused to pay. *id.*
 5. The party, in such a case, is not allowed 20 days within which to pay the costs. *id.*
 6. Twenty days are allowed only where the plaintiff is allowed to stipulate to try his cause on payment of costs. *id.*
 7. Form of the power from the attorney to demand costs. *id.*
 8. A rule for denying a motion carries costs of course, unless the contrary be expressed in the rule. *Jackson v. Gayer*, 484
- See JUDGMENT AS IN CASE OF NONSUIT, 6, 9, 10.
- ## III.
1. Unnecessary papers, copied in *hæc verbis* into a case, though allowed by the judge on settling the case, were disallowed in taxation. *Jackson v. Mather*, 584
 2. Only one draft of subpoena and subpoena ticket allowed, though several subpoenas issue. *id.*
 3. Certified copies from the secretary's office taxed. *id.*
 4. So certified copies of depositions taken *pendente lite*, under act to perpetuate the testimony of witnesses, &c. (1 R. L. 465.) *id.*
 5. But there must be an affidavit that these were necessary, &c. *id.*

8. Though judgment be against executors and heirs, in separate suits, for the same debt, on the same bond, there will not be one taxation of costs under the statute, (1 R. L. 521, s. 14,) which applies only to cases where the defendants may be sued jointly. *Anonymous*, 591

See IV. 6.

IV.

1. Where a constable is sued for selling property on execution, and judgment is in his favor, he is entitled to double costs. *Wales v. Hart*, 426
2. Otherwise, where he is sued jointly with another and they plead jointly; though the judgment be in favor of both. *id.*
3. Where to trespass against a sheriff for an act done by him in virtue of his office, he pleaded the general issue and two special pleas, to which the plaintiff replied, and there were demurrers to the replications, and a verdict for the sheriff on the general issue; *held*, that the demurrers could not afterwards be argued; and the defendant had his double costs. *Shaw v. Raymond*, 512
4. Statutes giving double costs to certain officers who succeed in actions brought against them, "for or concerning any matter or thing done by virtue of their offices," (as in sess. 43, ch. 122, s. 2, relative to school trustees,) apply only to acts of *malfeasance*, not to those of *non-feasance*: as detaining money which they may have officially received. *Platt v. Osborn*, 527
5. On affirmance of judgment upon a writ of error, the plaintiff is entitled both to double costs and interest by way of damages for delay of execution. *Anon.* 579
6. Interest taxed with the costs. *id.*

COUNTY, DIVISION OF.

See SURREGATE. VENUE, 3.

COUNTY TREASURER.

See ACTION, 3.

COURT OF ERRORS.

1. A circuit judge will not be allowed to act as counsel in the court of errors. *Seymour v. Ellison*, 13

2. A writ of error to the supreme court will not lie upon a judgment by default. *Colden v. Knickerbacker*, 31
3. And if brought, the proper course is neither to affirm nor reverse the judgment below; but dismiss the writ of error. *id.*
4. In error, to the supreme court, upon the coming in of the usual return, containing the judgment roll only. *id.*
5. The plaintiff in error alleged diminution, viz. that there yet remained in the court below, a *capias*, return, filing, rule to plead, for default, interlocutory judgment, for reference to the clerk to assess damages, for report thereon, and for final judgment, a declaration and common bail piece, &c. *id.*
6. And prayed and had a certiorari to the court below, upon which transcripts of all these proceedings were certified. *id.*
7. Form of alleging diminution and the certiorari in such case. *id.*
8. Upon the return to the certiorari, the plaintiff in error objected, not only error in the roll, but certain irregularities in the proceedings below, viz. *id.*
9. That the defendant below (plaintiff in error) did not appear in the court below; that his name in the *capias* and the subsequent proceedings were different; that there was a material variance between the declaration and roll; that common bail was irregularly filed; that the *capias* was returnable at a late day in term, and yet the declaration was entitled generally, &c. *id.*
10. And error in the roll was also insisted on, viz. that the declaration contained a count upon a promissory note, with the common money counts; and yet the clerk assessed damages generally, whereas he should have assessed upon the count on the note only. *id.*
11. And 12 of the court were for dismissing the writ of error, and therefore, did not consider whether the above matters could be alleged for error, or not. *id.*
12. But 8 of the court were opposed to dismissing the writ of error yet they were of opinion that none of the above matters were sufficient cause for reversing the judgment; and, therefore, it should be affirmed. *id.*
13. *Semble*, therefore, that these, and the like omissions and mistakes, not appearing upon the rolls, are matters of irregularity—not error; and are the proper subjects of redress by motion in the court below: *id.*
14. And, *semble*, that it is not erroneous or irregular for the clerk to assess general damages on a judgment by default upon a declaration containing a count upon a promissory note, and the common money counts. *id.*
15. But *vid.* *Burr v. Waterman & Wells*. 36 note (f) contra.

16. In the court of errors, a stipulation between the attorneys, solicitors, or counsel in a cause, is binding, though not reduced to writing. *Chamberlain v. Fitch*, 243
17. Default, obtained in violation of such an order, set aside, with costs. *id.*
18. An irregular order, reversing the decree of the chancellor, in consequence of which the papers in the cause are remitted to the court of chancery, set aside, and the register of that court ordered to return them to this court, that the cause may proceed. *id.*
19. But the order here, being to reverse an order in the court of chancery, dissolving an injunction to stay proceedings on a judgment and execution at law, upon which the money had been collected, and paid over to the attorneys for the plaintiff there, (the respondent here,) the rule setting aside the default was so modified as not to take effect till those attorneys stipulated, that in the event of a reversal of the chancellor's order, the money so collected and paid to them should be placed at the disposal of the court below. *id.*
20. Form of the rule for this purpose. *id.*
21. Rule, on dismissing an appeal upon the second call of the cause that the appellant pay the respondent 100 dollars besides the taxable costs; the court, being of opinion that the appellant had conducted vexatiously. *Murray v. Mumford*, 400
22. The power of the court to allow beyond the taxable costs, considered. *id.*
23. The question considered, whether this court can, on affirmance of a decree of the court of chancery, upon appeal, order the appellant to pay the respondent a sum beyond the taxable costs. *Easton v. Tallmadge*, 402
24. Additional sum refused under the circumstances of the case. *id.*

See EXECUTION, 5.

COURT OF CHANCERY.

1. Where F. purchased of R. a tract of land on the bank of the Ohio river. R. representing and believing, that it contained a valuable coal mine; and, besides paying to R. \$4400, F. covenanted to pay him an annuity of \$100 for 20 years; which annuity was to cease, if after the mine was faithfully worked by F., it should not yield a certain quantity of coal, and the land was accordingly conveyed by R. to F.; it turning out, in fact, that there was not such a coal mine as was represented by R.; a perpetual injunction was granted to restrain R. from prosecuting at law for the annuity, though it did not appear that R. had been guilty of fraud. *Roosevelt v. Fulton*, 129

2. *Held*, also, that as there was no such coal mine in the land, as was represented, F. need not work the mine in order to determine the quantity of coal. *id.*
3. Relief can be had in equity against any deed, or contract in writing, founded on a mistake: *id.*
4. And this, whether the mistake is set up affirmatively, by bill, or as a defence: *id.*
5. And the mistake may be shown by parol proof. *id.*
6. A party asking equity must do equity. *M'Donald v. Neilson*, 139
7. Chancery may relieve against deeds or judgments obtained by fraud or imposition; or where, if regularly obtained, there are circumstances of extraordinary hardship, or great inadequacy of consideration; but the party asking equity must do equity; and he must not, on his part, have been guilty of fraud and chicanery. The hardship should not be the consequence of his own misconduct; nor should he delay coming for relief, till the situation of the parties is so far changed that they cannot be reinstated in their original rights. *Per Savage, Ch. J.* *id.*

See MORTGAGE, III. PLEADINGS IN CHANCERY
WITNESS, 1, 2.

COURT OF OYER AND TERMINER

1. A court of oyer and terminer cannot be adjourned by a circuit judge, or otherwise by reason that a number of the county judges sufficient to make a quorum are not present at the day appointed for holding it. *People v. Bradwell*, 445
2. And where a quorum did not appear till the third day of the circuit, and then opened the oyer and terminer and convicted a criminal; *held*, that the proceeding was *coram non judice*. *id.*
3. But the court, on certiorari, ordered a rule to set aside the proceedings so as to prevent any advantage by a plea of *extorsio convict*. *id.*

COURT OF COMMON PLEAS

1. A court of common pleas has a right, in their discretion, to set aside the report of referees, upon the ground that it is founded on testimony of a witness who in their opinion was not credible. *Ex parte Bisset*, 458
2. So of the verdict of a jury. *id.*
3. And this court will not interfere, to regulate such discretion, by mandamus. *id.*
4. Although they may think the common pleas erred. *id.*

- 5 Unless it be in a plain case admitting of no doubt; so that there is no room for discretion. *id.*
- 6 Where an inferior jurisdiction, having discretion, has proceeded to exercise it, this court will not control it. *id.*

See MANDAMUS, 2, 3, 4.

COURTS OF GENERAL SESSIONS OF THE PEACE.

See CERTIORARI.

COURTS OF SPECIAL SESSIONS.

The 4th section of the act declaring the powers and duties of justices of the peace (2 R. L. 507, 8,) and creating a special session for the trial of petit larceny without a jury, is not contrary to any provision in the Constitution of the United States, or of this state. *Murphy v. The People*, 815

COURTS OF JUSTICES OF THE PEACE.

- I. Jurisdiction.
- II. Service and return of process.
- III. Appearance.
- IV. Adjournment.
- V. Pleadings.
- VI. Venire.
- VII. Jury.
- VIII. Evidence.
- IX. Judgment.
- X. Execution.

I.

See CORAM, I. 4, 5, 7.

II.

1. The plaintiff in a justice's court may serve his own summons, either where he is himself a constable or specially deputed for the purpose. *Tuttle v. Hunt*, 436
2. The return of a summons in a justice's court, personally served, and stating the time when, is sufficient. *Legg v. Stillman*, 418

III.

- 1 A parol warrant of attorney, to appear

in a justice's court is sufficient, and may be proved by the attorney himself. *Pixley v. Butts*, 421

2. A justice has no right to admit an attorney to appear upon his own knowledge of his authority. *Beaver v. Van Every*, 429
3. A justice may appoint a guardian *ad litem* for an infant; and if the infant does not nominate a guardian, the justice may appoint such person as he shall think proper on the motion of the plaintiff. *Bullard v. Spoor*, 430
4. But this must be a real, not a fictitious person. *id.*

IV.

1. Though the cause have been twice adjourned by consent, and the last adjournment be under the defendant's stipulation that he will not delay the cause farther; but will absolutely come to trial on the said adjourned day, yet the justice is bound to adjourn again on the defendant's giving security, and showing, on oath, the absence of material testimony, &c., with due diligence used to obtain it. *Smith v. Fenton*, 425
2. The defendant is entitled to one adjournment of course, on making oath and giving security; *id.*
3. And on showing cause, he may have a still further adjournment, provided the 3 months have not expired. *id.*

V.

A declaration in general indebitatus assumpsit in a justice's court is good, on general demurrer, though it contain neither time nor place, nor any request to pay. *Keyser v. Shafer*, 437

VI.

In an action under the 50 dollar act, it is too late for the defendant to demand a jury of 12 men after a jury of 6 has been demanded by the plaintiff and a venire issued. *Bullard v. Spoor*, 430

VII.

1. The justice may, on his own motion, challenge and set aside a juror for intoxication. *Bullard v. Spoor*, 430
2. If neither party object, this silence concedes the fact of intoxication. *id.*

VIII.

Admitting evidence of a plaintiff's declaration in his own favor, if objected to, is fatal on error, though the court below direct the jury to disregard it. *Tuttle v. Hunt*. 436

IX.

1. A judgment confessed before a justice for 50 dollars or less, is good, without the oath and specification required by the 7th section of the 50 dollar act. *Snyder v. Warren*, 518
2. The act, (sess. 41, ch. 94, s. 6 & 7,) empowering a justice of the peace to render judgment on confession to 100 dollars, and prescribing the manner in which this shall be done, and declaring the judgment void unless its provisions are complied with, did not require a particular of the items, oath, &c., except where the judgment exceeded 50 dollars, (exclusive of costs.) But see the statute, sess. 47, ch. 238, s. 12 & 13, which now requires this where the judgment exceeds 25 dollars, (exclusive of costs.) *Griffin v. Mitchell*, 548
3. Omitting a particular of the items, oath, &c., renders the judgment void as to creditors only; but it is valid and binding upon the defendant. *id.*

X.

See APPEAL, 2, 3.

COURT OF ADMIRALTY.

See INSURANCE.

COVENANT.

1. An executor assigns a judgment in favor of his testator, and covenants as executor, that so much is due upon it; *held*, that the covenant is personal, and binds him in his own right. *Marvin v. Stone*, 781
2. In construing a covenant, it must be considered with the context, and must be performed according to the intention of the parties as derived from both. *id.*
3. Accordingly, where S. and D. two of H.'s executors, as such, assigned a judgment to M. in favor of H. against E. who was also executor, and S. and D. covenanted, as executors, that *there was due and unpaid upon the judgment, to the assignors,*

at the time of the assignment, \$684; held, that the covenant was broken as instanti that it was made; for H. having appointed E. his executor, and he having accepted the trust, this extinguished the judgment and as there was nothing due or unpaid thereon, within the meaning of the covenant; for the covenant meant, 1. that it was due; 2. that it was due to the assignors as executors; 3. due at the time; 4. due upon the judgment. *id.*

4. *Covenant.* Cases cited illustrating the proposition that though the letter of a covenant be fulfilled, yet an action lies, if its spirit and intent be violated. The Attorney General, *arguendo*. *id.*

CUSTOM AND USAGE OF TRADE

Custom and usage of trade. What is a good custom or usage: manner of proving them; for what purposes they are evidence; *held* not to sanction a penal offence. Authorities to these points collated. *Griffin v. Bank of Utica v. Wager*, 712

See USURY, 29.

D

DEED.

1. In certifying the acknowledgment of a mortgage, or deed, &c., under the statute, (1 R. L. 369, s. 1,) it is sufficient for the officer to say "on, &c., before me, A. B. one, &c., came J. S. to me known, and acknowledged that he executed the above mortgage (or deed) for the uses and purposes therein mentioned," &c., without saying "to me known to be the person described in and who executed the said mortgage," (or deed.) *Jackson v. Gumaer*, 552
2. That the omission of this clause has been extensively practiced in the state, so that many titles would be disturbed by allowing it to affect the certificate, would perhaps amount to a construction of the act, and at all events would render the court unwilling to listen to an objection for this cause. *id.*
3. Form of such a certificate. *id.*
4. The deed to or from a lunatic, before office found, is not void but voidable only; and, therefore, one who is not in privity with the lunatic cannot object his insanity. *id.*
5. The objection that a conveyance of land is void, because the grantor is out of possession, does not apply to a patent or deed of land from the people of the state. *id.*

- 6 The registering a deed of conveyance is not notice to a subsequent purchaser, except in cases where its registry is made necessary by statute. E. g. Registering a sheriff's deed is not notice. Per Sutherland, J. *James v. Morey*, 246

DEFORCEMENT.

See EXECUTORY DEVISE, 5.

DEMURRER.

1. Where there are several pleas, some of which are carried to an issue of law, and some to an issue of fact, the plaintiff may first argue the demurrer, or try the issue of fact, at his election. *Shaw v. Raymond*, 512
2. Though a demurrer must be signed by counsel, yet if it is not so signed, and the opposite attorney, on its being served, sign an admission *that he has been served with a demurrer, &c.*, this is a waiver of the defect, and he cannot treat it as a nullity. *Anon.* 578

See HEIRS AND DEVISEES.

DEVISE.

1. *Construction of Devise.* Authorities cited that a will must be construed throughout as it should have been at the instant of the testator's death, and cannot be varied by subsequent circumstances. Per Jones, counsel, immediately after the close of the attorney general's argument. *Wilkes v. Lion*, 333
2. *Seisin of the devisor.* Authorities cited showing that he must be seised at the time of his death; otherwise devise cannot take effect. *id.*

See EXECUTORY DEVISE.

DISTRESS.

1. There are three kinds of rent, viz. rent service, rent charge, and rent seck. Their nature, and difference between them. *Cornell v. Lamb*. 652
2. For a rent service, the landlord may distrain of common right; but for a rent charge, only in virtue of a clause of distress. He cannot distrain for a rent seck, for the statute, 4 Geo. 2, ch. 28, which

gives distress for all rents, has not been enacted in this state. *id.*

3. Fealty is not, in fact, due upon any tenure in this state. It is altogether fictitious. It is retained by statute as to lands holden in *socage*, and abolished as to all grants made directly from the state; (1 R. L. 70;) but the right to distrain is not impaired by the statute. It remains as at common law, by which fealty was incident to every tenure, and the right of distress incident to fealty; and even if the latter be taken away, yet, where it would have existed at common law distress may be made. *id.*
4. So that a distress may in all cases be made upon a lease by parol, which would be valid by the statute of frauds, where the lessor retains the reversion. *id. Schuyler v. Leggett*, 660, S. P.
5. *Semble*, fealty is no longer necessary to support the right to distrain. *id.*
6. The common law right of distress was not intended to be abolished, but to be preserved in full force, by the act concerning distresses, rents and the renewal of leases. (1 R. L. 434.) *id.*
7. Whether, where the landlord executed a lease for 7 years, and left it with a depository appointed by the lessee, for him to execute on his part, which he agreed to do, but neglected; and yet took possession of the premises and held them more than a year, the landlord may consider the lease as executed by the tenant and distrain under it? *Quere. Schuyler v. Leggett*, 660

DOWER.

See ARBITRAMENT AND AWARD.

DUELLING.

See OATHS.

E

EJECTMENT.

- 1 *Ejectment.* Authorities cited, that if the interest of the plaintiff's lessor expire after the commencement of the suit, and before judgment, he shall have judgment and execution for his damages, but not for the land. *Wilkes v. Lion*, 333
2. *Ejectment.* Authorities cited and considered, which show the exceptions to the rule that the defendant may protect himself by showing an outstanding title. *Burr*,

- counsel, *arguendo*. Answer by Jones, counsel, at the close of his reply. *id.*
- 3 The lessor in ejectment is not bound, of course, to enter into special consent rule, but only on application to the court. *Jackson v. Stiles*, 442
 4. Form of a special consent rule by tenant in common, and of rule for leave to enter into it. *id.*
 5. A female lessor of the plaintiff in an action of ejectment, is not exempt from an attachment for non-payment of the defendant's costs, where they do not exceed 50 dollars. *Jackson v. Haines*, 462
 6. The statute, exempting females from imprisonment on execution, does not apply to such a case. *id.*
 7. To warrant one's being made a lessor in ejectment, he must have a claim to a subsisting title or interest in the premises. *Jackson v. Paul*, 502
 8. It is not enough that it may be a question on the trial whether the legal title is not vested in him. *id.*
 9. A delay of more than 4 years to bring ejectment, after notice to quit by a mortgagee to the mortgagor, is not a waiver of the notice. *Jackson v. Stafford*, 547
 10. The notice to quit by a mortgagee to a mortgagor, need not direct the mortgagor to quit on a day in the year corresponding with the date of the mortgage. *id.*
 11. To entitle the tenant to enter into a special consent rule in an action of ejectment, as a tenant in common, he must, at least, swear that he claims as tenant in common. *Jackson v. Stiles*, 585
 12. That he believes the action will involve a question between tenants in common, is not enough. *id.*
 - 13 One claiming in opposition to the title of the tenant is not entitled to be admitted defendant in ejectment with the tenant. *Jackson v. Flint*, 594
 14. Nor, *semb.* is he entitled to be admitted a co-defendant with the landlord of the tenant, though he claim as tenant in common with such landlord, who is willing and requesting to have him joined as a defendant. *id.*
 15. The court will not stay proceedings in ejectment, till the costs of a former ejectment are paid, unless it appear that the same title was, or might have been tried in the former suit. *Jackson v. Stiles*, 596
 16. And where W. brought ejectment against T. and G. sought to be admitted to defend as landlady of T. which was denied, because T. was the tenant of W; on G.'s bringing ejectment against T. *held*, that the proceedings should not be stayed in the second ejectment, till G. had paid the costs of the first. *id.*
 17. Form of writ of inquiry on affirmance of judgment in ejectment upon error un-

der the statute, (1 R. L. 343 s. 3.) *Jackson v. Rathbone*. 602

See LANDLORD AND TENANT.

EQUITY.

See COURT OF CHANCERY.

ERROR.

1. Writ of error to the common pleas. *Burr v. Waterman and Wells*, 36. note (f)
2. Return. *id.*
3. Assignment of errors, viz. insufficiency of *narr*; general assignment of errors. *id.*
4. Diminution alleged, viz.; no warrant of attorney, nor rule to assess damages. *id.*
5. Writ of certiorari prayed. *id.*
6. Certiorari to certify the warrant of attorney, and rule for assessment of damages, if to be found, &c. *id.*
7. Return to the certiorari, no warrant of attorney; but a memorandum of a warrant, and rules, &c. *id.*
8. Judgment erroneous, no *nolle prosequi* having been entered on the counts, other than the count on the promissory note; and the rule to assess damages and assessment and judgment thereon, being general. *id.*
9. There can be no assessment of damages by the clerk, on the common money counts or on an insimul computassent. *id.*
10. After joinder in error, the party cannot allege diminution, and have a certiorari. *Rew v. Barker*, 408
11. *It seems*, that where a judge omits to notice material testimony in his charge to the jury, this is not error, unless the party call his attention to it, and request him to give it in charge. *Ex parte Bailly*, 479
12. The remedy for refusing to comply with such request is not by mandamus to compel a new trial, (though the refusal be by a judge of the C. P. who should refuse to grant a new trial,) but by a bill of exceptions, and a writ of error. *id.*
13. It seems that on issue of fact upon a writ of error, and verdict for the plaintiff, the rule for reversing the judgment is not a common rule. *Brown v. Lerow*, 525

See AMENDMENT, 5, 6. CERTIORARI, 9. COSTS, I. 8, 9. IV. 5, 6. COURT OF ERRORS EJECTMENT, 17. *Stare decisis*.

ESTATE.

Legal meaning of the word.

See MORTGAGE, XIV. 15.

ESTATE TAIL.

See EXECUTORY DEVISE, 2, 12, 13.

EVIDENCE.

1. *Evidence.* Authorities cited, showing that after a man's absence for 7 years, without being heard of, he shall be presumed dead. Burr, counsel, *arguendo.* *Wilkes v. Lion*, 333
2. That the instrument forged was in possession of the party at the time he uttered and published it, is, *prima facie*, evidence that it continues under his control at the time of the trial. *People v. Kingsley*, 522

See CORPORATION, 3, 10, 11. COURTS OF JUSTICES OF THE PEACE, VIII. CUSTOM AND USAGE OF TRADE. INSURANCE, 11. *Lex Mercatoria.* MORTGAGE, 4, 5. POOR, 10. SLANDER, 2, 3, 4, 5.

EXECUTION.

1. *Execution*—The cases which require regularity, and fairness in a sale under, cited by respondent's counsel. *M'Donald v. Neilson*, 139
2. Right of tenant by the curtesy *initiate*, sold on execution. *Schermerhorn v. Miller*, 439
3. By the seisin of the wife in fee, of one undivided third part of certain premises, and the birth of a child alive, the husband became tenant by the curtesy *initiate*; then his interest was sold to R. G. on execution: then the whole premises were sold to R. G. under the statute of partition. On application by R. G. before the expiration of 5 months from the first sale, the court ordered one-third of the proceeds of the sale to be put at interest by the clerk, to be disposed of by the court, at the expiration of the 15 months, according to the rights of the parties at that time. *id.*
4. Two writs of *fi. fa.* may issue on the same judgment, into different counties at the same time. *Hammond v. Mather*, 456
5. On judgment being affirmed in the court of errors, execution may issue from this court at any time on filing the *remittitur*, of course, and without the entry of any rule for that purpose. *Lyon v. Burtiss*, 510
6. The 15 months redemption from a sale on execution allowed by the statute, are calendar, not lunar months. *Snyder v. Warren*, 518
7. In computing the time, the creditor is allowed full 15 months, from the day of sale. *id.*

See AMENDMENT, 7, 8, 9. CONSTABLE, 4 to 13. COURTS OF JUSTICE OF THE PEACE, IX. EJECTMENT, 5, 6. SHERIFF.

EXECUTORS AND ADMINISTRATORS.

1. It is a general rule, that if a creditor appoint his debtor his sole executor, or one of his executors, and the debtor accept the trust, this operates as a release or extinguishment of the debt. *Marvin v. Stone*, 781
2. But a qualification, universal as the rule is, that where there is a deficiency of assets to pay debts, the debt due from the executor is not discharged; but shall be considered a part of such assets. *id.*
3. In the latter case, it has, in judgment of law, been paid to the debtor executor and is considered as money in his hands. *id.*
4. Choses in action are, generally, not deemed assets till actually received by the executor. *id.*
5. But if he release the debt, it is assets; and he shall be adjudged to have received it. *id.*
6. The appointment, by a creditor, of his debtor an executor, is considered in the nature of a *specific bequest* to him of the debt, and as such must give way to creditors. *id.*
7. But a specific bequest takes preference of general legacies, and, as such, the bequest of the debt will be preferred. *id.*
8. On a deficiency of assets to pay debts, all the general legacies must abate proportionally; but a specific legacy is not to abate at all, unless there be a deficiency without. *id.*
9. Whenever, from the whole will, it appears that the testator did not intend to discharge the debt, by making his debtor an executor, the latter is a trustee to the amount of the debt for the legatees or next of kin. *id.*
10. But making a judgment debtor executor with others, and in the will bequeathing all *judgments* that may be in the hands of his executors to others, does not show such intention. *id.*
11. The debt, when assets for legatees, &c. would be considered money, in the hands of the debtor executor.

See COVENANT, 1, 3.

EXECUTORY DEVISE.

1. E. died in September, 1798, having, by his last will, dated August 29, 1798, devised lands to his son Joseph, in fee; and other lands to his son Medcef, in fee; and added, "It is my will, and I do order and appoint,

- that if either of my said sons should *depart this life, without lawful issue*, his share or part shall go to the *survivor*; and, in case of both their deaths, without lawful issue, then I give all the property, &c., to my brother John E. of, &c., and sister Hannah J. of, &c., and their heirs." Joseph, one of the sons, died in August, 1812, without lawful issue, leaving his brother M. surviving, who afterwards died on the 26th July, 1819, without lawful issue: *Held*, that on the death of the testator's son Joseph, the limitation over, which was good as an executory devise, vested in M. the surviving son. *Wilkes v. Lion*, 333
2. And per Sanford, Chancellor, concurring with the Court below, the devise in his favor, having taken effect, ceased to be executory, and he became seised in fee tail, by necessary implication of law, with a remainder expectant in favor of John E. and Hannah J. the brother and sister of the testator; and by virtue of the statute of the 23d of February, 1786, abolishing estates tail, M. became seised, in fee simple absolute, of all the estate devised to his brother Joseph. *id.*
 3. And per Cramer, Senator, the devise to John E. and Hannah J. was originally limited upon too remote a contingency, to wit, an indefinite failure of issue in the two previous devisees. This not being qualified, like the devise over to Medcef, by the word *survivor*, the last devise was void for this reason. *id.*
 4. No division of the Court was taken as to the ground upon which they denied operation to the last devise; but they voted *generally*, to affirm the judgment below. *id.*
 5. A person holding land by *deforcement* merely, cannot levy a fine so as to affect or bar a stranger to it. *id.*
 6. And, accordingly, B. having purchased Joseph's interest in his lifetime, and levied a fine thereof; *held*, that this would not bar the right of Medcef. *id.*
 7. When the first of several executory devises vests in possession, those which follow, vest in interest at the same time, and ceasing to be executory, become vested remainders, subject to all the incidents of remainders. Per Sanford, Chancellor. *id.*
 8. No remainder can exist without a preceding estate to support it. *id.*
 9. Whenever a devise of a future interest can take effect as a remainder, it shall be so considered, and not as an executory devise. *id.*
 10. Our laws allow the owner of lands to devise them according to his affections or his pleasure. *id.*
 11. *Rule* recognized, that an executory devise shall not prevail, when it extends beyond a life or lives in being, and 21 years and 9 months afterwards. *id.*
 12. All dispositions in the nature of entails are opposed to the policy of our institutions. *id.*
 13. *It seems*, that estates tail are not simply abolished and thrown back to fees conditional at the common law, either by the statute of 1782, the statute of 1786, (vid. 1 Greenleaf, 205. 1 Kent & Radcliff, 44. 1 Woodworth & Van Ness, 52,) or by the act of 1788, repealing all the English statutes. (Vid. 2 Greenleaf, 116, s. 37. 1 Kent & Radcliff, 358, s. 28. 1 Woodworth & Van Ness, 526, s. 30.) But these statutes suffer the estate tail to arise, and then change it into a fee simple. *id.*

EXTINGUISHMENT.

See MORTGAGE, XIV.

F

FEALTY.

See DISTRESS, 1, 3.

FEES.

See CLERK OF SESSIONS AND OVER AND THE MINER. CONSTABLE, 1, 2, 3, 4, 5, 6

FEIGNED ISSUE.

See JUDGMENT.

FIERI FACIAS.

See EXECUTION, 4. SHERIFF.

FINE.

See EXECUTORY DEVISE, 5, 6

FORGERY.

EVIDENCE, 2. INDICTMENT.

FRAUD.

See COURT OF CHANCERY

FRAUDS, STATUTES OF.

See LANDLORD AND TENANT.

FRAUDULENT SALE.

The non-delivery of property, on sale, is only one circumstance in proof of fraud, and may be explained. *Butts v. Swartwood*, 431

G

GUARDIAN AD LITEM.

See COURTS OF JUSTICES OF THE PEACE, III.
3, 4.

H

HABEAS CORPUS.

1. Suit is removed from common pleas by habeas corpus, and the plaintiff neglects to declare within two terms, and the defendant afterwards refuses to receive a declaration; then the plaintiff brings a second action here for the same cause. The court will not stay proceedings in the last suit till the costs of the first are paid. *Lawrence v. Dickenson*, 580
2. Where the defendant removes a cause by habeas corpus and the plaintiff does not follow him by declaring in this court, he is not bound to pay costs. *id.*
3. The two terms within which a plaintiff is allowed to declare on a *habeas corpus* must be reckoned inclusive of the term at which bail is put in. *Bogart v. Brinkerhoff*, 587
4. Motion to set aside declaration served after that time; but because the plaintiff showed a good excuse for the delay, the motion was denied. *id.*
4. And so the plaintiff does not *absolutely* lose his right to declare, though two terms pass. *id.*

HEIRS AND DEVISEES, &c.

1. Form of declaring against heirs, on the simple contract of the ancestor, under the act "for the relief of creditors against heirs and devisees" (1 R. L. 316.) *Whitaker v. Young*, 569
2. The statute prescribing the mode of proceeding against joint debtors, where a

part only are brought into court, (1 R. L. 521,) does not apply to an action against heirs, &c. *id.*

3. These are liable to the extent of their inheritance only. *id.*
4. If some are not warned, those who are, must plead it in the first instance, or they lose the benefit of contribution. But where it appears on the face of the declaration, that only a part of the heirs, &c., are arrested in the suit, those who are so arrested may demur. *id.*

HIGHWAYS.

1. Though a road be laid out, the overseer of highways has no right to open it, by removing fences, without an order from the commissioners, or a majority of them. *Kelley v. Horton*, 424
2. Nor have they a right to open a road which they have laid out, or direct it to be opened by removing fences, until after 60 days notice to the owner, to remove his fences. *id.*
3. And if fences are removed, to open a road newly laid out, without such notice, all persons concerned therein are trespassers. *id.*
4. If an highway, or any part of it, be not opened and worked within 6 years after the 19th March, 1813, it ceases to be a road; though it had been opened and worked before that time, and within 6 years after it had been laid out. *Lyon v. Munson*, 426
5. Accordingly, where a road had been laid out in 1798, and opened and worked within 6 years thereafter; but a part of it had been fenced up, and the travel turned another way for 6 years after, and including, the 19th March, 1813; *held*, that the part thus fenced ceased to be a road. *id.*
6. And consequently, that an action for the penalty of \$5, within the 25th section of the act to regulate highways, would not lie for continuing the fence. *id.*
7. The sworn application of 12 freeholders for a public highway, pursuant to the 16th section of the act to regulate highways, (2 R. L. 275,) is a public document, open for inspection by all the inhabitants of the town in which the road is laid out, and belongs to the town clerk's office. *People v. Vail*, 623
8. And if it come into the hands of a stranger, not a commissioner of highways, this court will compel him, by attachment, to file it with the town clerk for the inspection of a person who is a party to a suit in which the road is in question. *id.*
9. So for the inspection of one who is prose

cutting a mandamus to compel the opening of the road *id.*

HUSBAND AND WIFE.

See *AFFIDAVITS*, 6, 7, 8, 9.

I

INDICTMENT.

1. It is a general rule, that in an indictment for forgery, the instrument forged should be described particularly. *People v. Kingley*, 522
2. But if in the hands of the defendant, or lost or destroyed by him, the indictment may show this excuse, and set forth the instrument in general terms, if it contain enough to show the offence. *id.*
3. Dates, sums, and times of payment may be omitted. *id.*
4. And parol evidence given of the contents. *id.*

INFANT.

See *COURTS OF JUSTICES OF THE PEACE*, III. 3, 4.

INJUNCTION.

See *COURT OF ERRORS*, 19, 20.

INSOLVENT.

1. The rule to discontinue, on receiving a plea of an insolvent discharge, is not a rule of course. *Fifield v. Brown*, 503
2. An insolvent discharge of a neighboring state, which exempts the person from imprisonment but leaves the future acquisitions of the debtor liable to execution, relates to the remedy merely, not the contract, and is not of any force in this state. *Whittemore v. Adams*, 626
3. Imprisonment is no part of the contract. *id.*
4. The *lex fori* governs the remedy. *id.*
5. An insolvent law does not operate as a part of the *lex loci contractus*, unless it discharge the contract. *id.*

INSURANCE.

1. Insurance by the defendants, on a cargo, at and from New York to Havana, and at

and from thence to Lagaira and Porto Cavello, or either of them, at a premium of seven per cent. to return five and a quarter per cent. if the risk ended at H., without loss, or two per cent. if only one of the two other ports was used, and the risk ended without loss: warranted American property. The cargo, consisting of flour and pork, was purchased of the plaintiff a native American citizen residing in New York, by L., a Danish citizen of St. Thomas, then in New York, under a contract entered into here, by which the plaintiff agreed to deliver the cargo to L., at Havana, or at Lagaira, or Porto Cavello, at five per cent. advance on the invoice, or cost, paid by the plaintiff, and the freight, and premium of insurance, paid by the plaintiff. The cargo was consigned, by the plaintiff, to Spanish merchants, at Havana, (designated by L.,) with instructions to dispose of the cargo, for the plaintiff's account, &c., or to send it to another market, that is, to a windward port. The bill of lading expressed, that the cargo was shipped for the account and risk of the plaintiff, to be delivered at Havana, to H. & C. or their assigns, paying no freight, it being the property of the owner of the vessel: On the arrival of the vessel at Havana, the consignees interlined the bill of lading with the words, "or a market;" and directed the master to proceed to Lagaira; and while proceeding to Lagaira, the vessel was captured, near that place, by a Venezuelan privateer, and carried into a port in the island of Margarita, and the vessel and cargo libelled in the admiralty court there, and the cargo condemned as prize, &c. *N. Y. Firemen Insurance Company v. De Wolf*, 56

2. In an action on the policy to recover for a total loss: *Held*, that the cargo was, and remained the property of the plaintiff, until its delivery at one of the ports mentioned; that there was no delivery, or acceptance of it, at Havana; and that the consignees there, in directing the master to proceed to L., acted as agents of the plaintiff, who continued to be, and was the owner of the cargo, at the time of its capture; and that, therefore, the warranty was complied with. *id.*
3. That such a contract of sale is legal and valid, both by the municipal law of this country, and by the law of nations, and does not destroy the neutral character of the property. *id.*
4. That the plaintiff was not bound to disclose to the defendants the facts and circumstances of the contract; for even if they were material, yet the insured is not obliged to communicate any fact, as to which there is a warranty, express or implied. *id.*

5. Where, on a sale of goods, no time is stipulated for the payment, the price is to be paid on their delivery to the purchaser. *id.*
6. Provisions shipped by a neutral, with a view to supply the army or navy of a belligerent, are not contraband of war. *id.*
7. On the contrary, such a destination is perfectly lawful. *id.*
8. The right of neutral and peaceful states, to carry on commerce with countries at war, excepting in contraband articles, and with places in a state of blockade, is perfect and unquestionable: *id.*
9. But the question may frequently arise whether the contract is a fraudulent disguise, to give to the property the character of neutrality during its transit; and whether the property, in truth, belongs to the neutral or the enemy. *id.*
10. The principle of the law of nations, laying out of view the case of contraband articles, and of places actually invested, is, that the property of a neutral, in its passage to a country at war, is free; and that the property of the adverse belligerent is subject to capture and forfeiture. *id.*
11. It is settled that the sentence of condemnation by a foreign court of admiralty is not conclusive, but only *prima facie* evidence of the facts upon which it purports to have been founded; and the court will not hear an argument in favor of its being conclusive. *id.*
12. Other points were discussed by counsel, but not decided, viz. 1. Whether our courts will recognize a war between a colony and the mother country, as a lawful war, before the independence of the former is acknowledged, either by the mother country or our own government. 2. Whether a colony, being acknowledged independent, is bound by the treaties existing between the mother country and foreign nations. *id.*

INTEREST.

See USURY.

J

JAIL LIBERTIES.

See ATTACHMENT, 1.

JOINT DEBTORS.

See HEIRS AND DEVISEES.

JUDGMENT.

1. A judgment is not a lien on a term for years. *Merry v. Hallet*, 497
2. Which, when sold on an execution, is irredeemable after one year. *id.*
3. A judgment creditor cannot redeem a term for years. *id.*
4. A judgment created upon full consideration, though for the express purpose of enabling the creditor to redeem, is valid. *Snyder v. Warren*, 518

See BAIL, 1. COURTS OF JUSTICE OF THE PEACE, IX. 1, 2, 3. COVENANT, 1, 3. EXECUTORS AND ADMINISTRATORS, 10. MORTGAGE, IV. 5, 6, 7.

JUDGMENT AS IN CASE OF NON-SUIT.

1. One of several causes in favor of the same plaintiff, and involving the same defence, was tried, and verdict for defendant. The plaintiff declined trying the other causes, and made a case in the one tried; and the court denied the motion for judgment as in case of nonsuit in the others. *Sherman v. M'Nitt*, 452
2. But to avoid paying the costs which accrue in the others subsequent to the trial of the first, the plaintiff should apprize the defendant of his intention not to try. *id.*
3. Where a cause is called on the calendar, at the first day of the circuit, but not reached afterwards, it is no excuse against a motion for judgment as in case of nonsuit, that the usual practice at the circuit has been to call over the calendar on the first day, without taking it up in order; unless the judge intimate that he will not consider the first the regular and orderly call. *Jackson v. Sutphen*, 457
4. Motion for judgment as in case of nonsuit cannot be made by one of several defendants, without the concurrence of the others. *Bancroft v. Wilson*, 495
5. Where all the defendants move for judgment, if it appear that either has no right to move, as if judgment be against him by default, the motion will be denied as to all. *id.*
6. Where the circuit judge suspended the trial of a cause, on the suggestion of the plaintiff's counsel that it would be a long cause, and the business afterwards took such a course that the cause could not be tried at that circuit, a motion for judgment as in case of nonsuit was denied without costs. *Hart v. Hildreth*, 511
7. Absence of counsel on professional business, not allowed as an excuse for not go-

ing to trial, pursuant to a stipulation.

Jackson v. Wakeman, 578

8. Otherwise of sickness or other inevitable accident. *id.*

9. Upon the ordinary rule for judgment as in case of nonsuit, *nisi*, the defendant must demand costs, &c., before he can have judgment. *Jackson v. Eddy*, 598

10. But where the rule is absolute for judgment as in case of nonsuit, and is opened upon motion, on the payment of costs and stipulating, the plaintiff must tender the costs and stipulate, as a condition to having the effect of the rule. *id.*

JUDGMENT BY CONFESSION.

1. On moving to set aside a judgment by confession, on bond and warrant of attorney, for usury, it appearing from the affidavits to be doubtful whether the allegation of usury was true or not, the court directed a feigned issue to try the fact. *Morey v. Shearer*, 465

2. Form of the rule. *id.*

3. Rule for, and proceedings upon a feigned issue to try whether a judgment is fraudulent as to creditors, viz., *N. P. Record*, including *Placita*, *Declaration*, *Plea*, *Continuance*, *Postea* endorsed, Rule on filing *N. P. Record* and *Postea*. Note (a) 466

JUDGMENT BY DEFAULT.

See COURT OF ERRORS, 2, 3, 9, 14.

JURY.

See COURTS OF JUSTICES OF THE PEACE, VII.
SLANDER, 1. VERDICT, 1, 2.

L

LANDLORD AND TENANT.

Though a parol demise for 7 years be void by the statute of frauds, yet it enures as a tenancy from year to year, if the tenant enter and hold under it; and it will regulate the terms of the tenancy in other respects; as the rent, the time of year when the tenant must quit, &c. *Schuyler v. Leggett*, 660

See DISTRESS. EJECTMENT, 3, 7, 8, 11, 12, 13, 14, 16.

LANGUIDUS.

See RETURN OF WRIT. RULE TO BRING IN THE BODY, 1.

LAW OF NATIONS.

See INSURANCE.

LEASE.

See DISTRESS.

LEGACY.

See EXECUTORS AND ADMINISTRATORS, 6, 7, 8

LEX FORI.

See INSOLVENT, 4.

LEX LOCI.

See INSOLVENT, 5.

LEX MERCATORIA.

Lex Mercatoria: what—how proved. Authorities to these points collated. Griffin, counsel, *arguendo*. *Bank of Utica v. Weger*, 712

LIEN

See JUDGMENT

LIMITATIONS, STATUTE OF.

Case from Massachusetts Reports as to computation of time under. The first day to be exclusive. 614, note (a)

LUNATIC

See DEED, 4.

M

MANDAMUS.

1. Mandamus does not lie where party has remedy by action. *Boyce v. Russell*, 444

2. Though a verdict in the C. P. be against the weight of evidence, and that court, on motion, refuse a new trial, there being a counsellor at law on the bench, yet this court will not interfere by mandamus. *Ex parte Baily*, 479
3. Because the granting a new trial rests in discretion. *id.*
4. Though this court might interfere by mandamus in an extreme case of this nature, as where there is no room for doubt, yet such remedy should be exercised very sparingly. *id.*
5. Under the usual clause in an act dividing towns, requiring the supervisors, &c., to meet and apportion the poor and moneys of the respective towns, if they omit to do this or do it partially, by omitting to pass upon a particular pauper, mandamus lies to compel them to correct the apportionment. *Supervisor, &c., of Sandlake v. Supervisor, &c., of Berlin*, 485

See COURT OF COMMON PLEAS, 1, 2, 3, 4, 5, 6. HIGHWAYS, 8.

MERGER.

See MORTGAGE, XIV.

MISNOMER.

See CORPORATION, 15. PARTICULARS, BILL OF, 5.

MISTAKE.

See COURT OF CHANCERY, 1, 2, 3, 4, 5. USURY, 13, 14, 15, 16.

MONEY HAD AND RECEIVED.

See CAYUGA BRIDGE COMPANY, 3.

MORTGAGE.

- I. What shall be deemed a mortgage, its nature, what claims it shall secure, and the power of sale therein.
- II. Execution of a mortgage.
- III. When it will be set aside as oppressively, or unduly obtained.
- IV. Nature and extent of the estate of mortgagor and mortgagee.
- V. What course the mortgagee should pursue, in order to discharge senior incumbrances.
- VI. Foreclosure and sale at law and in equity.

- VII. Registry of the power to execute mortgage.
- VIII. Registry of mortgages.
- IX. Registry of the power of sale.
- X. Assignment of a mortgage; conveyance of premises in whole or in part by mortgagee; and how this affects the power of sale.
- XI. Registry of the assignment.
- XII. Assignee—his rights, and to whom he should give notice.
- XIII. By what act the mortgagee forfeits his right.
- XIV. Of the extinguishment or merger of the mortgage, by a union of the legal equitable estates in the same person.
- XV. Notice to quit.
- XVI. Right of redemption.

I.

1. A conveyance of property absolute in terms, if intended by the parties to be a security for a debt, is a mortgage. *Clark v. Henry*, 324
2. And this, whether the intention is manifested by a written defeasance, executed simultaneously with the conveyance, or by the parol declarations or the acts of the parties. *id.*
3. H. was indebted to C. on promissory notes of \$225, and executed an assignment to C., absolute in its terms, of a mortgage which H. held against one D. for \$1065 03; and C. and H. at the same time destroyed the notes: and C. executed to H. a writing, by which he promised to sell the mortgage to H. if he would pay C. \$225 by a certain day; and H. failed in the payment; and C. declared several times before the day of payment, that he held the assignment as security for his debt; *Held*, that the assignment was a mortgage, and not a conditional sale; and that H. might redeem on paying the debt due to C. with interest. *id.*
4. There is no exception to the rule, that a conveyance which is once a mortgage is always a mortgage. *id.*
5. No agreement in a mortgage, to change it into an absolute conveyance upon any event, will be allowed to prevail by a court of chancery. *id.*
6. English doctrine of tacking, and whether it extends to mortgagors and creditors, considered, per Woodworth, J. *James v. Morey*, 246
7. A mortgagee cannot hold the mortgage as security for any claim which he has against the mortgagor by bond or simple contract, &c., beyond the sum specifically secured by the mortgage. *id.*
8. Especially where an objection is interposed by a bona fide judgment creditor. *id.*

9. Yet a mortgage, to secure future advances, is valid. *id.*
10. And it seems, that, as between mortgagor and mortgagee, a mortgage given to secure one debt, may become security for a debt subsequently contracted by the mortgagor to the mortgagee, where the former consents. *id.*
11. A deed, absolute on the face of it, but intended by the parties as a security merely for a debt, though registered as a deed, is valid and effectual between the parties, as a mortgage; but it is liable to be defeated by a subsequent mortgage duly registered. *id.*
12. A mortgage is a mere incident to the debt; and an assignment of the interest in the land without the debt is a nullity. *Wilson v. Troup*, *id.*
13. A mortgage is good without a power of sale. *id.*
14. The nature of a power of sale in a mortgage considered. *id.*
15. It is a power coupled with an interest. *id.*
16. It seems, it is a power appendant, and not in gross. *id.*

See III. 2, 3.

II.

1. A power of attorney to execute a mortgage, authorizes the attorney to insert in the mortgage a power of sale, on default of payment. *Wilson v. Troup*, 195
2. This does not alter the nature of the instrument, or give any greater security than is implied in the word *mortgage*. *id.*
3. The power to sell applies solely to the remedy; and impairs no right of the mortgagor. *id.*
4. A power to give a mortgage must be taken to mean the instrument in common use as a mortgage, where the power is to be executed. *id.*
5. Mortgages in this state generally include a power of sale, or summary foreclosure; *id.*
6. And a power by a citizen of Pennsylvania to execute a mortgage in this state, implies an authority to insert a power of sale, &c. *id.*

III.

1. Where a party, whose personal property has been seized under an execution against him, and a sale of it forced with great rigor and oppression, and at enormous sacrifice, by the deputy sheriff, acting in concert with the creditor, who is the chief bidder at the sale, is induced, in order to avoid the sacrifice of the whole property, to yield to the demands of the creditor, and to give him a bond and mortgage for a large sum of mo-

ney, so as to cover not only the amount of the execution, but also debts due from a son of the debtor who is insolvent, the sale will be declared oppressive and illegal by a court of equity: and the bond and mortgage, as having been oppressively and illegally obtained, will be directed to stand as security for the amount only which is due on the execution, with interest and costs; and, on payment of that amount, to be delivered up and cancelled. *M'Donald v. Neilson*, 139

2. But where, in such case, the creditor has other demands against the debtor, though they could be enforced in a court of equity only, the bond and mortgage shall also stand as security for them. *id.*
3. And if it appear, moreover, that the bond and mortgage were executed upon full and adequate consideration, and are on the whole reasonable, the court will not interfere; especially where the debtor has delayed all objection to the security so long that the creditor cannot be reinstated in his original rights. *id.*
4. A legal act will always be presumed to have been done for a legal purpose, unless the contrary is made to appear by positive proof, or the strongest circumstantial evidence. Per Sutherland, J. *id.*
5. But when it does appear to have been done for an illegal purpose, a court of equity will restrict its operation to the object which might legally have been accomplished by it. Per Sutherland, J. *id.*

IV.

1. A mortgagor is deemed seized as to all persons except the mortgagee, &c. *Wilson v. Troup*, 195
2. Both at law and in equity, a mortgage is considered a mere security for money: *id.*
3. The interest of the mortgagee is a chattel merely; *id.*
4. And will pass by delivery without writing. *id.*
5. Where on a judgment entered by confession on a bond and warrant of attorney, a specification of the consideration was not filed, pursuant to the statute of 1818, (*now repealed*,) whether the judgment is fraudulent and void as against a subsequent creditor by mortgage? *Quære. James v. Morey*, 246
6. And, per Savage, C. J., a mortgagee is not a purchaser within that act. *Woodworth J.*, contra. *id.*
7. The meaning and extent of the term *purchase*, considered, at law and in equity. Per Woodworth, J. *id.*

V.

1. A mortgagee may pay off a senior incum

- france; and on bill filed to foreclose, and to be reimbursed the sum which he has paid, he is entitled to a decree for indemnity out of the proceeds of the sale of the mortgaged premises. *Dale v. M'Evers*, 118
2. But whether, if he purchase the mortgaged premises under the senior incumbrance, he can have a decree for the price which he has paid, to be allowed out of the proceeds of a sale under his mortgage? *Quere.* *id.*
3. Whether, in judgment of law, the interest which he thus acquires as purchaser is a full equivalent for the money which he pays? *Quere.* *id.*
4. Where W. held a mortgage against F., on lots in the city of New York, subject to a tax due to the corporation, and the lots were sold at auction for the tax, and the executors of the mortgagee bid them in for a term of one year, at the amount of the tax, and then filed their bill praying to be reimbursed by a sale of the mortgaged premises under a decree of foreclosure; *held*, that they were purchasers in their own right, and must rely upon the use of the premises, during the term, for their reimbursement. *id.*
5. A tax laid upon real estate in the city of New York, for the purpose of opening or improving a street, &c., takes preference of a prior mortgage. *id.*

VI.

1. A mortgagee, though he have conveyed the whole mortgaged premises with warranty in fee, can yet foreclose; for this conveyance of the land will not pass his interest in the mortgage. *Wilson v. Troup*, 195
2. So if he have thus conveyed only a part of the mortgaged premises, he may yet foreclose for the whole under a power of sale in the mortgage; and may himself become the purchaser. *id.*
3. Whether a mortgagee, having assigned part of his interest in the mortgage, may foreclose under a power of sale in his own name, or must give notice in the name of himself and his assignee? *Quere.* *id.*
4. Though the mortgagee convey in fee a part of the mortgaged premises, this does not prejudice the right of the mortgagor to redeem. *id.*
5. A statute foreclosure of a mortgage is equivalent to a foreclosure in equity. *id.*
6. If a mortgagee convey a part of the mortgaged premises with warranty, and afterwards himself purchase the whole under the power of sale, the purchase will enure to the benefit of his grantee. *id.*
7. Term of order of reference to a master, to ascertain and report balance due on mort-

gage, &c.—Order of sale of mortgaged premises.—How to dispose of proceeds,—to deliver title deeds, &c.—to deliver possession to the purchaser. *id.* *James v. Morey*, 246

See AFFIDAVIT, 5.

VII.

1. It is not necessary to the validity of a mortgage, or a purchase under a power of sale therein, even as against subsequent purchasers, &c., that the power to execute it should be registered according to the statute, (1 R. L. 373, s. 2.) *Wilson v. Troup*, 195
2. This is not necessary as against the mortgagor. *id.*

VIII.

1. Of two unregistered mortgages, the latest takes preference. Per Savage, Ch. Justice. *James v. Morey*, 246
2. The second cannot take preference, unless registered; and not even then, if the second mortgagee have notice of the first mortgage. *id.*
3. A mortgage, by way of an absolute deed, must be registered as a mortgage, in order to be effectual against subsequent bona fide purchasers or mortgagees. *id.*
4. The registering it as an absolute deed, is not sufficient for this purpose. *id.*

IX.

1. The provision that the power of sale shall be recorded before a conveyance under it shall be executed (sess. 36, ch. 32, s. 6, 1 R. L. 374,) is for the benefit of the purchaser; and was intended to protect him against subsequent purchasers, &c. *Wilson v. Troup*, 195
2. But it does not lie with the mortgagor to object, that a sale and conveyance have been made under the power, without its having been recorded. *id.*
3. It was conceded by the court, that the registry of a power, the proof or acknowledgment of which was taken out of this state, though before a commissioner resident here, is a nullity. *id.*

X.

1. If the donee of a power appendant and

coupled with an interest (as a mortgagee) convey his whole estate, this would pass, but not extinguish the power. *Wilson v. Troup*, 195

2. This is the common case of the assignment of a mortgage: *id.*
3. Which carries not only the legal estate, but all the remedies or powers attached to it. *id.*
4. But a conveyance of a part of the estate will not carry with it a corresponding portion of the power; *id.*
5. Because the power is indivisible. *id.*
6. It can operate but once, and then is exhausted. *id.*

XI.

1. The recording an assignment of a mortgage is not necessary within any of the general registry acts. *James v. Morey*, 246
2. It is, therefore, no notice to a mortgagor, so as to render payments by him to the mortgagee, in his own wrong. *id.*
3. Nor is it notice to a subsequent assignee of the mortgagee; *id.*
4. Nor to a subsequent purchaser or mortgagee of the premises. *id.*

XII.

1. The assignee of a mortgage takes it subject to all the equities existing between the mortgagor and mortgagee at the time of the assignment; but not subject to the latent equities of third persons, unless the assignee have notice of such equities. *James v. Morey*, 246
2. Payments made after an assignment, but before notice of the assignment is given to the mortgagor, must be allowed to him. *id.*
3. But it is not necessary to the protection of the assignee, that he should give notice of his assignment to a subsequent assignee, or purchaser from the mortgagee. *id.*
4. One assigns as mortgagee: Whatever interest he afterwards acquires in the mortgaged premises, enures to confirm the assignment. Per Sutherland, J. *James v. Morey*, 246

XIII.

Whether one having a recorded mortgage, standing silently by, and seeing another bid off the mortgaged premises on a judgment younger than the mortgage, forfeits his claim under the mortgage in equity? *Quere*. Per Sutherland, J. But, per

Savage, C. J.: he does not; for the registry is notice to all the world. *James v. Morey*, 246

XIV.

1. At law, where a greater estate and a less meet, and coincide in the same person, in one and the same right, without any intermediate estate, the less estate is immediately annihilated, or, in the law phrase, is said to be merged. *James v. Morey*, 246
2. This rule, at law, is inflexible. *id.*
3. And where the equitable and legal estates unite in the same person, the equitable is merged in the legal estate. *id.*
4. But, in equity, the rule is not inflexible. *id.*
5. It depends on the expressed or implied intention of the person in whom the estates unite, whether the equitable estate shall merge, or still be kept in existence. *id.*
6. Or upon the circumstance that he is not capable of making an election, being an infant, a lunatic, &c. *id.*
7. In the latter case, the equitable estate shall still be kept on foot. *id.*
8. And so where it is for the interest of the person in whom these estates unite, the law will imply an intention to keep the equitable estate on foot. *id.*
9. Thus, where a mortgagee purchases or takes a release of the equity of redemption, the whole estate is vested in him, and the mortgage is extinguished. *id.*
10. And with it the mortgage debt. *id.*
11. Unless intention, incapacity to elect, or interest, &c., in the mortgagee, intervene to prevent the merger. *id.*
12. And where a mortgagee purchases, or takes a release of the equity of redemption in a part of the mortgaged premises, the mortgage is extinguished *pro tanto*. *id.*
13. And may be apportioned between the part, as to which it is extinguished, and the part in relation to which it exists. *id.*
14. Various acts, declarations and circumstances considered, which evince an intention to keep the legal and equitable estates distinct, or to unite them. *id.*
15. Meaning of the word *estate*, in lands, &c. Per Sutherland, J. *id.*
16. Can be no merger unless estates meet. Per Sutherland, J. *id.*
17. When an equitable estate is once merged by an union with the legal, it is gone forever, and cannot be revived. Per Cramer, Senator. *id.*
18. Where the equity of redemption is merged by being united with the legal estate in the hands of a mortgagee, &c., an assignment by the words *grant*, &c., may enure as a conveyance in fee, if not restrained by the *habendum*. Per Woodworth, J. *id.*

XV.

See EJECTMENT, 9, 10.

XVI.

See VI. 4.

MOTIONS.

See PRACTICE, V.

N

NAME.

See CORPORATION, 15. PARTICULARS, BILL OF, 4, 5.

NEUTRAL RIGHTS.

See INSURANCE.

NEW TRIAL.

1. A court will, in their discretion, sometimes deny a new trial, though the verdict be plainly against law, as if the nature of the controversy be trifling, &c., *Ex parte Bailey*, 479
2. Motion for a new trial, for irregularity and newly discovered evidence, is an enumerated motion. *Anon.* 586

See COSTS, I. 10. COURT OF COMMON PLEAS. ERROR, 12. MANDAMUS, 2, 3, 4. SLANDER, 2, 5.

NEW YORK, CITY OF.

On ordering a rule to pay out moneys which have been paid into this court, as belonging to unknown owners in the city of New York, under the powers of the corporation to enlarge and improve streets, this court will, if the claim be doubtful, require security to refund on its turning out to be unfounded. *Matter of De Wint*, 498

See MORTGAGE, V 5.

NEW YORK FIREMEN INSURANCE COMPANY.

See CORPORATION.

NONSUIT.

See JUDGMENT AS IN CASE OF NONSUIT.

NOTICE.

See DEED, 6. MORTGAGE, XI. XII. 2, 3

NOTICE TO QUIT.

See EJECTMENT, 9, 10. LANDLORD AND TENANT.

O

OATHS.

Since the adoption of the new constitution, the oath against duelling cannot be required of a solicitor, counsellor, &c. *Case of Weed*, 29, note(b) Cor. Sanford, Chancellor.

OFFICE.

See ATTORNEY.

ORDER OF RELIEF

See POOR, 4.

OVERSEERS OF HIGHWAYS.

See HIGHWAYS, 1, 2, 3.

OYER AND TERMINER

See COURT OF OYER AND TERMINER.

P

PARTICULARS, BILL OF.

1. The defendant may demand a bill of per-

- decide before appearance. *Stewart v. Gardiner*, 463
2. An order for a bill of particulars, staying the proceedings absolutely till a bill is delivered, is irregular. *id.*
 3. It should be that a bill be furnished by such a day, or cause shown against it. *id.*
 4. But though irregular, it stays the proceedings till vacated. *id.*
 5. The law knows of but one abolition name; and, therefore, the omission of V. S. in the name of one of the plaintiffs in the title to such an order, is not such a misentitling as will render it null. *id.*
 6. Order for bill of particulars absolute in the first instance. The judge is supposed to vacate the order for that reason, which he refuses to do. *Harrod v. Henry*, 587
 7. Order, therefore, set aside for irregularity. *id.*

PARTITION.

In partition, money paid into court for use of owners unknown, paid out to claimants, without requiring security to refund, as provided by the statute, (secs. 36, ch. 100, s. 7, 1 R. L. 511,) it appearing that the sum claimed was small, and the claimants wealthy. *Green v. Beckman*, 577

PAUPER.

See POOR.

PENAL STATUTE.

See CAYUGA BRIDGE COMPANY, 4.

PLEADINGS IN CHANCERY.

1. Where the complainant in chancery omits to reply, and sets down the cause for hearing on bill and answer, the latter will be taken as conclusive proof of the facts which it sets up by way of defence. *Dale v. M'Evers*, 118
2. If the complainant mean to question the truth of the answer, he should reply, and give the defendant an opportunity to take his proofs. *id.*
3. Every material allegation should be put in issue by the pleadings. Per Woodworth, J. *M'Donald v. Neilson*, 139

PLEAS AND PLEADING.

1. A plea in abatement, e. g. non-judicial of

- others as defendants, cannot be received after a plea in bar, e. g. the general issue. *Palmer v. Hopton*, 417
2. In assumpsit the defendant pleaded the general issue, and a second plea, false in fact, and about which there was some doubt as to its goodness in point of law; and on motion by the plaintiff, the court ordered it stricken out. *Stewart v. Hotchkiss*, 634. *Rickley v. Froome*, H. T. 1822. K. B. 637, note (c) S. P.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2. CORPORATION, 15, 16. COURTS OF JUSTICES OF THE PEACE, V. DEMURRER. HEIRS AND DEVISEES, 1. PLEADINGS IN CHANCERY.

POOR.

1. One who had been occasionally and partially relieved by the town, and whose circumstances had undergone no material change for the better after being relieved, was holden to be a pauper. *Supervisor, &c. of Sandlake v. Supervisor of Berlin*, 485
2. An order removing a pauper appealed from and abandoned by the town who remove, who assents to take back the pauper without trying the appeal, is not conclusive as between that town and the county. *People v. Supervisors of Cayuga*, 530
3. The latter is not protected by it from maintaining the pauper as one having no residence in the state. *id.*
4. Where a magistrate makes an order to maintain a pauper, as a non-resident of this state, and unable to be removed, this, it seems, is conclusive upon the board of supervisors. *id.*
5. If it do not appear that one has gained a settlement in his own right, his settlement follows that of his father. *Wickham v. Albany*, 537
6. But a change in the settlement of the father will not affect that of the son, if the father's settlement is obtained after the emancipation of the son. *id.*
7. What shall amount to an emancipation. The grandfather had a settlement in N: his son's settlement follows the father's, and the son not having gained a settlement in his own right, the grandson is in the

10. It appeared that at the Albany almshouse, certain books are kept in which the names of paupers, &c., are entered; and also quarterly returns made to the corporation. To show that a pauper was settled at Albany, by being entered and recognized as a pauper of that city, the almshouse books being (as insisted) burnt, parol proof of their contents was offered; held, that admitting the books to have been burnt, parol was not the next best evidence, but the quarterly returns should be produced. *id.*

See MANDAMUS, 5.

POSSESSION, ADVERSE.

See Jackson v. Gumaer, 552. *id.* 563, note (c)

POWER.

1. The power to execute an instrument of known and definite signification in the law, will not authorize the execution of one having a different effect. Thus, a power to convey does not authorize the attorney to insert in the conveyance a covenant of seisin. *Wilson v. Truap*, 195.
2. The words even of a naked power are not always confined to what they necessarily import in their strictest legal sense. *id.*
3. But they are to be construed according to the intent of the parties. *id.*
4. This rule considered upon authority. *id.*
5. And applied. *id.*
6. The distinction between powers appendant and in gross. The first is where the donee of the power has an estate in the lands; and the estate to be created by the power does, or may take effect in possession, during the continuance of the estate to which the power is annexed. *id.*
7. As a power to a tenant for life, in possession, to make leases. The latter is where the donee of the power has an estate in the lands; but the estate to be created under the power is not to take effect till the determination of the estate to which it relates. *id.*

See MORTGAGE, II. X.

PRACTICE.

See CERTIORARI. COURT OF ERRORS. COURTS OF JUSTICE OF THE PEACE, III. 3, 4. EJECTMENT, 3, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 16, 17. ERROR. GUARDIAN AD LITEM.

HABEAS CORPUS. INSOLVENT, I. JUDGMENT BY CONFESSION. NEW YORK, CITY OF. PARTITION. DEEDS AND PLEADING. PRODUCTION OF PAPERS. RULE TO BRING IN THE BODY. REFRESHMENT.

- I. Relative to process.
- II. Arrest, detainer, bail and appearance.
- III. Bill of particulars.
- IV. Service of papers.
- V. Motions.
- VI. Waiver of Irregularity.
- VII. Staying and setting aside proceedings.
- VIII. Feigned issue.
- IX. Judgment.
- X. Execution.
- XI. Certiorari.
- XII. Writ of Error.
- XIII. Costs.
- XIV. Examining papers.

I.

See ARREST, 1, 2.

II.

See ARREST, 1, 2. BAIL.

III.

See PARTICULARS, BILL OF.

IV.

Where an attorney boards at one dwelling house, and has his office at another dwelling house, and he is absent, leaving no one in his office, the service of papers should be by delivery to some person belonging to the house where he boards, rather than to one belonging to the house where his office is kept. *Lathrop v. Judivini*, 484.

See DEMURRER.

V.

1. A non-enumerated motion, though granted, may be opened of course, at any time during the progress of the non-enumerated business, the counsel on both sides being in court. *Jackson v. Eddy*, 598.
2. But if both are not present, same case should be shown upon affidavit. *id.*

See AFFIDAVIT, 4. NEW TRIAL, 2. PRODUCTION OF PAPERS.

VII.

Motion to stay proceedings till the costs of a former suit be paid, comes too late after judgment perfected. *Fifield v. Brown*, 503

See EJECTMENT, 15, 16. HABEAS CORPUS, 1. PARTICULARS, BILL OF, 4.

VIII.

See JUDGMENT.

IX.

See JUDGMENT. JUDGMENT BY CONFESSION. JUDGMENT AS IN CASE OF NONSUIT.

X.

See CONSTABLE, 5, 6, 7, 8, 9, 10, 11, 12, 13.

XI.

See CERTIORARI.

XII.

See ERROR. COURT OF ERRORS.

XIII.

See ARBITRAMENT AND AWARD, 8. COSTS.

XIV.

See AFFIDAVIT, 2, 3, 6, 7. CERTIORARI, 11.

PRODUCTION OF PAPERS.

1. In trover for a bond, a motion to compel delivery of a copy, to enable the plaintiff to declare accurately, was denied. *Denslow v. Fowler*, 592
2. When the court will order one party to produce papers in his custody or under his control, for the inspection or benefit of the opposite party, 592, 3 note (a)

PROMISE.

If the vendee leave goods with the vendor after contract of sale executed, the law implies a promise by the vendee to pay the expense of keeping them. *Ree v. Martin*, 417

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PURCHASER.

See MORTGAGE, IV. 5, 6, 7. V. 2, 3, 4

R

REFERENCE.

The affidavit for a reference need not state where the venue is laid. *Cleveland v. Streng*, 448

See COSTS, I. 1. COURT OF COMMON PLEAS, 1, 3, 4, 5.

REGISTRY OF DEEDS.

See DEED, 1, 3, 4, 6.

REGISTRY OF TRANSFER OF STOCK.

See VENDOR AND VENUE.

RELEASE.

See EXECUTORS AND ADMINISTRATORS, 1, 5.

REMAINDER.

See EXECUTORY DEVISE, 2, 7, 8, 9.

REMITTITUR.

See EXECUTION, 5.

RENT.

See DISTRESS.

RES JUDICATA.

See ACTION, 1, 2.

RETURN OF WRITS.

1. On a return of *cepi corpus*, the plaintiff may proceed to file common bail and take judgment, though the sheriff in fact have suffered the defendant to go at large without bail. *Byrne v. Morris*, 472
2. A return by a sheriff thus: "I have taken the defendant, who remains under my custody, so sick that I cannot have his body before the justices, &c.," is a return of *cepi corpus* simply, and the addition "so sick, &c." is surplusage. *id.*
3. It seems, that the English return of *lan-guidus* has no application to this state. *id.*
4. And see note (a) p. 477.

ROADS.

See HIGHWAYS.

RULE TO BRING IN THE BODY.

1. Origin and history of this rule. 477, n. (a)
2. Rule to bring in the body. *People v. Marsh*, 493
3. Rule for attachment for not bringing in the body. *id.*
4. The sheriff must have full 20 days notice of the rule to bring in the body, exclusive of the 1st day of term. *id.*
5. On the sheriff becoming fixed for not bringing in the body, the general rule is that he must pay the whole debt. *People v. Adgate*, 504
6. But if the defendant has been insolvent from the beginning so that the plaintiff could have lost nothing, the court will order a perpetual stay of proceedings against the sheriff as to the debt allowing the plaintiff to proceed and collect all costs. *id.*
7. And this was done where the sheriff had neglected to appear upon his recognizance taken upon the attachment, by reason whereof there was judgment against him and his bail. *id.*

S

SALE AND REDEMPTION OF LANDS ON EXECUTION.

See EXECUTION, 2, 3, 6, 7. JUDGMENT

SALE OF BANK STOCK.

See VENDOR AND VENDEE.

SALE OF CHATTELS.

See INSURANCE, 3 to 9. WARRANTY OF CHATTELS.

SALE FRAUDULENT.

See FRAUDULENT SALE.

SERVICE OF PAPERS.

See PRACTICE, IV.

SET OFF.

1. *Set-off*—Authorities, limiting the right of, to cases of mutual debts, and excluding the right to set off torts and damages upon a special agreement, cited by counsel for the respondent, with those which show the rule to be the same in equity as at law. *M'Donald v. Neilson*, 139
2. To constitute a right of set-off in equity, there must be mutual debts between the same parties, in their own right, of the same kind or quality, and be clearly ascertained or liquidated. Per Woodworth, J. *id.*
3. A court of equity follows the same rule as a court of law, in respect to set off Per Woodworth, J. *id.*

See COSTS, I. 2.

SETTLEMENT.

See POOR, 2 to 10.

SHAM PLEA.

See PLEAS AND PLEADING, 2.

SHERIFF.

1. A sheriff is not bound to obey the instru-

- tions of a party, in executing a *fi. fa.* if he sees it will produce a great sacrifice of property; *M' Donald v. Neilson*, 189
2. But should rather postpone the sale; especially where the plaintiff cannot sustain any injury by the delay. *id.*
 3. He should take all necessary and lawful measures to secure the sum he is directed to levy; *id.*
 4. But as to the time, place and manner of sale, he is vested with a sound discretion. *id.*
 5. *Duty of officers in executing process*—The law will make the most liberal intendment in favor of its ministerial officers, but will not permit them to resort to the *ultima ratio*, when the legitimate objects, which it is their duty to effect, can be accomplished by milder means. Per Sutherland, J. *id.*
 6. Sheriff should obey a *fi. fa.* in having money at return day—should not show favor nor give unreasonable delay, nor be guilty of oppression, nor use more severity than is necessary. Per Savage, Ch. J. *id.*
 7. The sheriff may sell a term in goods or chattels, upon execution against the lessee; and the purchaser acquires a right to use the goods during the term. *Van Antwerp v. Newman*, 543
 8. If the sheriff sell the goods as the absolute property of the tenant, not mentioning his special property, though he know of it, no action lies against him for this at the suit of the lessor; for it does not divest the lessor's right or impair his reversionary interest. *id.*
 9. *Aliter*, it seems, if he destroy the goods or otherwise injure them. *id.*
 10. The sheriff cannot seize and sell the property of A. upon an execution against B. *id.*
 11. Proceedings to obtain leave to prosecute the general sureties of a sheriff, under the statute, (1 R. L. 521, s. 6.) *Ex parte Noble*, 590
 12. In general, the affidavit should show a *fi. fa.* and return of *nolle bona*, &c., on the judgment against the sheriff; but this is not necessary, where it is shown clearly that he is insolvent. *id.*

See Costs, IV. 3. RETURN OF WRITS. RULE TO BRING IN THE BODY.

SLANDER.

1. In slander, where there is the least room for criticism on the import of the words, this should be determined by the jury, whose decision is conclusive. *Ex parte Bailey*, 479
2. Slander is in the nature of a penal action, and though the jury find for the defend-

ant against the weight of evidence, a new trial will not be granted. *id.*

3. In slander, for charging plaintiff with felony, evidence of his general character is admissible, in mitigation of damages under the general issue. *Paddock v. Salisbury*, 811
3. Otherwise, it seems, if a justification be pleaded. *id.*
5. In slander, in penal actions, actions for a libel and other actions, vindictive in their nature, a new trial will not be granted merely because the verdict is against the weight of evidence. *id.*

STARE DECISIS.

1. The maxim *stare decisis* considered, *arguendo*, by counsel; by Root President, Sanford, Chancellor, and Wheeler, Senator, in the course of discussion; and by Cramer, Senator, in delivering his final opinion in the cause. *Wilkes v. Lyon*, 333
2. A point once directly decided by the court, may be raised for the purpose of bringing a writ of error in another cause; but the court will not hear it argued. *Bank of Utica v. Wager*, 712

SOLICITORS & COUNSEL IN CHANCERY.

See OATHS.

STATUTE.

See USTURY, 10.

STATUTES CONSTRUED EXPLAINED OR CITED.

[NOTE.—R. L. refers to the Revised Laws by Woodworth & Van Ness, in 1813.]

- 1813, April 5, Sess. 36, ch. 56, s. 15. 1 R. L. 522. (Assessment of damages by the Clerk.) 31, 39
- 1788, February 26, re-enacted April 6, 1801, and again in March 19, 1813. Sess. 36, ch. 32, s. 5, 6. See 2 Greenleaf, 101. 1 K. and R. 482. 1 R. L. 373, 4 (Foreclosure of mortgage at law.) 195
- 1813, March 19, Sess. 36, ch. 32, s. 1, 1 R. L. 372. (Registry of Mortgages.) 246
- 1813, April 12, Sess. 36, ch. 97, s. 1. (Registry of Deeds.) 246
- 1786, February 23, Sess. 9, ch. 12, s. 1, 1 R. L. 52. (Estates Tail.) 333

1813, April 9, Sess. 36, ch. 83, 2 R. L. 3. (Costs.) 400, 402
 —, April 9, Sess. 36, ch. 83, 2 R. L. 27. (Costs.) 407
 —, April 5, Sess. 36, ch. 56, s. 1, 7, 1 R. L. 515, 516, 518. (Reference Costs.) 412
 —, April 5, Sess. 36, ch. 53, s. 1, 1 R. L. 515. (Costs.) 413
 1818, April 10, Sess. 41, ch. 94, s. 1 and 5. (Costs.) 413
 1813, April 12, Sess. 36, ch. 96, s. 5, 1 R. L. 344. (Costs.) 413
 1797, March 28, Cayuga Bridge Compa-
 1799, March 1, ny. 419
 1815, April 18, Sess. 38, ch. 233, s. 1. (Cay-
 uga Bridge Company.) 419
 1813, March 19, Sess. 36, ch. 33, s. 39, 2 R. L. 283. (Highways.) 424
 —, March 19, Sess. 36, ch. 33, s. 23, 2 R. L. 277. (Highways.) 277
 1820, April 12, Sess. 43, ch. 184. (Sale and Redemption of Lands on Execution.) 439
 1813, April 12, Sess. 36, ch. 100, s. 14, 1 R. L. 513. (Partition; tenant by the curtesy.) 438
 —, April 5, Sess. 36, ch. 53, s. 17, 1 R. L. 396. (Certiorari.) 440
 —, April 5, Sess. 36, ch. 66, s. 9, 1 R. L. 338. (Oyer and Terminer.) 445
 —, April 5, Sess. 36, ch. 3, s. 5, 1 R. L. 319. (Supreme Court.) 445
 —, April 5, Sess. 36, ch. 65, s. 7, 2 R. L. 147. (Court of Common Pleas and General Sessions.) 445
 1823, April 19, Sess. 46, ch. 197, s. 1. (City Commissioners to take affidavits.) 457
 1813, April 5, Sess. 36, ch. 56, s. 34, 1 R. L. 527. (Women, Attachment.) 462
 —, April 8, Sess. 36, ch. 79, s. 3, 1 R. L. 545. (Surrogate.) 471
 1824, February 5, Sess. 46, ch. 30. (Yates County.) 471, 526
 1812, June 19. (Act to divide the towns of Greenwich and Berlin.) 485
 1820, April 12, Sess. 43, ch. 184. (Sale and Redemption of Lands on Execution.) 497, 518
 1813, April 9, Sess. 36, s. 184, 2 R. L. 418. (City of New York.) 498
 1801, February 24, Sess. 24, ch. 13, s. 4, 1 R. L. 141. (Certiorari to General Sessions.) 501
 1818, April 10, Sess. 41, ch. 94, s. 17. (Justice's Execution.) 506
 1801, March 21, Sess. 24, ch. 47, s. 1, 1 R. L. 155. (Double Costs.) 512
 1820, March 30, Sess. 43, ch. 122, s. 2. (Double Costs.) 527
 1818, April 10, Sess. 43, ch. 94, s. 6. (Judgment by confession before a Justice.) 548
 1813, April 12, Sess. 36, ch. 97, s. 1, 1 R. L. 369. (Proof and acknowledgment of Deeds.) 552

1813, April 5, Sess. 36, ch. 56, s. 18, 1 R. L. 521. (Joint Debtors.) 569
 —, April 12, Sess. 36, ch. 100, s. 7, 1 R. L. 511. (Partition of Lands.) 577
 —, April 12, Sess. 36, ch. 96, s. 13, 1 R. L. 346. (Double Costs.) 579
 —, April 6, Sess. 36, ch. 67, s. 6, 1 R. L. 421. (Sheriffs Sureties.) 590
 —, April 5, Sess. 36, ch. 56, s. 14, 1 R. L. 521. (Taxation of Costs.) 591
 1801, March 20, Sess. 24, ch. 25, s. 3, 1 R. L. 143. (Costs.) 602
 1818, April 10, Sess. 41, ch. 94, s. 17. (Appeal.) 605
 1787, February 20, Sess. 10, ch. 36, 1 R. L. 70. (Tenures.) 652
 1813, April 6, Sess. 36, ch. 71, s. 3, 2 R. L. 234. (Banks.) 678
 —, April 13, Sess. 36, ch. 104, s. 4, 2 R. L. 507-8. (Special Session.) 815

STAYING PROCEEDINGS.

See PRACTICE, VII.

SUBPOENA.

See COSTS, III 2.

SUPERVISORS.

See CLERK OF SESSIONS AND OYER AND TERMINER. POOR, 4.

SURROGATE.

Bugbee, an inhabitant of the town of Benton, in the county of Ontario, died, and afterwards the county of Yates was erected including the town of Benton; *Held*, that the granting administration of the estate of Bugbee pertained to the surrogate of Ontario, and not to the surrogate of Yates
Bugbee v. Surrogate of Yates, 471

T

TAXES.

See MORTGAGE, V. 5.

TENANT BY THE CURTESY.

See EXECUTION, 2, 3.

TENANT FROM YEAR TO YEAR.

See LANDLORD AND TENANT.

TENDER.

See CERTIORARI, 9.

TENURE.

See DISTRESS.

TERM FOR YEARS.

See JUDGMENT.

TIME.

1. Where the computation of time in a statute is to be from an act done, the first day, or day of the act should be excluded. *Ex parte Dean*, 605
 2. The English and American cases which relate to the computation of time from an act done, either under a statute or otherwise, collated. 606 to 615, note (a.)
- See APPEAL, 8, 9. COSTS, II. 1, 2, 5, 6. EXECUTION, 6, 7. LIMITATIONS, STATUTE OF. USURY, 8, 9, 26.

TOLL.

See CAYUGA BRIDGE COMPANY.

TOWNS.

See MANDAMUS, 5.

TREATY.

See INSURANCE, 11.

TROVER.

See PRODUCTION OF PAPERS, 1.

TRUST.

See TRUSTEE.

TRUSTEE.

A trustee may purchase for the exclusive benefit of his *cestuy que trust*. And if he purchase for his own benefit, it is good until set aside by the *cestuy que trust*, who alone has a right to object. *Wilson v. Troup*, 195

See EXECUTORS AND ADMINISTRATORS, 9.

UNIVERSALIST.

See WITNESS.

USURY.

1. Discounting a note at 7 per cent. and taking the interest in advance, is not usury, either in bankers or others. *N. Y. Firemen Insurance Company v. Sturges*. 664
2. Where a trifling excess is taken, on discounting a note, beyond the legal interest, it will be presumed to be by mistake, and not by the adoption of an erroneous rule of calculation, until the latter is shown. *id.*
3. Taking beyond the legal interest, by mistake, is not usurious. *id.*
4. Though, it seems, it would be otherwise, where the excess arises from the voluntary adoption of an erroneous rule of calculation. *id.*
5. Casting interest, upon the principle, that 30 days are the 12th of a year, 60 days the 6th, 90 days the 4th of a year, and the 3 days of grace the 10th of a month, and discounting a note upon such a calculation, is usurious: and the note, consequently, void. *N. Y. Firemen Insurance Company v. Ely*, 678
6. The right to take interest in advance on discounting a note, is not confined to banks, bankers, and merchants discounting bills in the fair course of commercial business, but extends to individuals, and others having a general right to discount. *id.*
7. The rule is this: Taking interest in advance is allowed for the benefit of trade; though it exceed the legal rate of interest. The instrument thus discounted, must be such as will, and usually does, circulate in the course of trade, viz. a negotiable instrument, and payable at no very distant day. Under this restriction, taking interest in advance, either by a bank, an incorporated company without banking powers, or an individual, is not usurious. *id.*
8. An usage among banks to cast interest at a year for 360 days; one-half of a year for 180 days; one-quarter of a year for 90 days; one-sixth of a year for 60 days; and

- the 3 days of grace at one-tenth of a month, would not prevent its being usurious, though such usage were universal. *id.*
9. The legal year is 365 days; the legal half year is 182 days, and the legal quarter 91 days, the law paying no regard to the odd hours. *id.*
10. A statute cannot be abrogated or controlled by the custom or usage of a particular trade. *id.*
11. To constitute usury, there must be a corrupt agreement. *id.*
12. Payment, and receipt of usurious interest is *prima facie*, evidence of a corrupt agreement. *id.*
13. This may be repelled by showing that it was by mistake. Examples of mistake; miscast; miscount of money, &c. *id.*
14. But the adoption of an erroneous principle of calculation, which gives more than 7 *per cent. per annum*, and receiving the discount or interest, according to that principle, is usury, though the lender believe that he has a legal right to do so. *id.*
15. The former is a mistake of the fact; the latter of the law. *id.*
16. An agreement to pay more than legal interest, through ignorance of the law, is void. *id.*
17. Whether there be a corrupt agreement, so as to constitute usury, is a question of fact; but where the facts are proved beyond dispute, the law fixes the intent. *id.*
18. This distinction considered and illustrated. *id.*
19. Three things necessary to constitute usury; a loan, taking more than lawful interest, and a corrupt agreement. *Bank of Utica v. Wager*, 712
20. Taking the interest in advance, on discounting a note, is not usury; though it was formerly held otherwise. *id.*
21. But, it seems, this is confined to bankers, and those who deal in commercial paper by way of trade. *id.*
22. The cases upon the two last points considered. *id.*
23. A bank having established certain days for discounting notes, discounts a note at 90 days, taking the interest in advance. At the discount day nearest the day when the note falls due, but previous to the latter, the note is renewed, the interest being again taken in advance; and the note is renewed the same way a third time; so that for part of the time for which the notes run, interest is taken at the rate of 14. *per cent. per annum*, owing to a lapse of the notes. This is not usury, unless there was an agreement upon the first loan, either express or implied, that the note should be thus renewed, or it otherwise appears that the transaction was a cover for usury. *id.*
24. In taking interest in advance on dis-

- counting a note, it is lawful to include the 3 days of grace in the computation. *id.*
25. To every practical purpose, the days of grace are a part of a promissory note. *id.*
26. But to take interest in advance upon discounting a 90 day note, calculated at one-quarter of a year for 90 days, is usurious, and the note void. *id.*
27. Receiving usurious interest, intentionally, is sufficient evidence of a corrupt agreement. *id.*
28. The policy of the statute of usury vindicated. *id.*
29. Custom or usage will not be received to sanction usury. *id.*
30. S. P. as to usury, custom, discount, &c. *Bank of Utica v. Smalley*, 770

See JUDGMENT BY CONFESSION.

V

VENDOR AND VENDEE.

1. A transfer of bank stock is valid as between the vendor and vendee, though the act of incorporation provide that no such transfer shall be valid or effectual till registered in a book to be kept by the bank for that purpose, and the debts due from the vendor to the bank, &c., shall be first paid. *Bank of Utica v. Smalley*, 770
2. This clause in bank charters is intended merely for the protection of the bank; i. e. to give them a lien on the stockholder for what he owes the bank, and enable them to ascertain the persons to whom dividends are due. *id.*
3. Till registry, therefore, it seems, they would be protected in a payment of dividends to the person in whose name the stock stands upon the bank books, without regard to any secret transfer. *id.*
4. One who has assigned his stock is a competent witness for the bank, having this clause in its charter, without registry, or showing that he has paid, or is not indebted to the bank. *id.*

See PROMISE.

VENUE.

1. It seems the plaintiff may retain his venue by stipulating to pay the expense of the defendant's witnesses. *Harrower v Betts*, 496
2. But the defendant has no right to a change of the venue by stipulating to pay expense of the plaintiff's witnesses. *id.*
3. The usual clause in the act dividing a

county, that the division shall not affect any suit or action, &c., (Vide, Sect. 48, ch. 30, § 2, in relation to Yates county,) applies to the venue, and retains the place of trial in the old county. *Jackson v. Davis*, 580

VERDICT.

1. The separation of the jury after agreeing upon their verdict, is not a cause for setting aside the verdict. *Horton v. Horton*, 589
2. *Aliter*, if there is the slightest suspicion that their separation was abused; to the injury of the party. *id.*
3. The court will not, on affidavit, amend a special verdict agreed upon by the parties without trial. *Jackson v. Cannon*, 615
4. But if there appear to have been a mistake as to a material fact, by either party, in framing the verdict, they will order it to be vacated on payment of costs. *id.*

See **AMENDMENT, § Court of Common Pleas.**

W

WAR

See **ESSENTIALS.**

WARRANTY OF CHATTELS.

1. In an action upon a warranty of a chattel, it is not necessary to prove that the word warrant was used. *Roberts v. Morgan*, 438
2. Any affirmation amounting to a warranty is sufficient. *id.*

WELLS.

Sketch of the life and character of Mr. John Wells, 14 to 28, note (a)

WILL.

See **DEVISE EXECUTORS AND ADMINISTRATORS. EXECUTORS DEVISE.**

WITNESS.

1. A party charged as conspiring with others in a fraud against which relief is sought and who, therefore, is made a defendant but against whom no particular relief is prayed, may, though liable for costs, be a witness for his co-defendants. *MP Davis v. Neilson*, 119
2. He comes within the exception to the general rule excluding a witness on account of interest, viz. that where the interest is contingent or uncertain, the witness is nevertheless competent, and the objection shall be confined to his credibility. *id.*
3. It seems, that communications made to an attorney at law, by one who has retained him to conduct a foreclosure by advertisement, under the act concerning mortgages, such communications having relation to the business of the foreclosure, are to be considered as confidential communications between attorney and client; and therefore inadmissible in evidence against the client. *Wilson v. Troup*, 195
4. One who believes in the existence of a God, who will punish him if he swears falsely, is a competent witness. *Betts v. Swartwood*, 481
5. Within this definition, an unbeliever who believes future punishment not to be eternal, is a competent witness. *id.*
6. To this point, see also, *The People v. Materson*, Cor. Walworth, C. Judge, 452, n. (a;) and *Anon. Cor. Williams*, C. Judge, supplement to that note, at page 572, in which opinions is considered the question whether one is a competent witness, who believes in a future punishment in this life only.

See **VERDICT AND VERDICTS.**

WOMEN.

See **ESSENTIALS, § 6.**

WRIT OF ERROR.

See **STATE DECISIONS, 2.**

END OF VOLUME SECOND.

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W.P.

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